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v.
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Docketed: August 9, 2005
Lower Ct: Supreme Court of Indiana
Case Nos.: (52S02-0412-CR-510)
Decision Date: June 16, 2005
Questions Presented

| ~~Date~~ | ~~~~~~~~Proceedings and Orders~~~~~~~~

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05-5705

Supreme Court, U.S.
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No. 05-

IN THE
SUPREME COURT OF THE UNITED STATES

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HERSHEL HAMMON,

Petitioner

v.

STATE OF INDIANA,

Respondent.

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On Petition for Writ of Certiorari to the
Indiana Supreme Court

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# PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether an oral accusation made to an investigating officer at the scene of an alleged crime is a testimonial statement within the meaning of *Crawford v. Washington*, 541 U.S. 36 (2004).

## LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

## TABLE OF CONTENTS


PETITION FOR A WRIT OF CERTIORARI ..... 1

OPINIONS BELOW ..... 1

STATEMENT OF JURISDICTION ..... 1

CONSTITUTIONAL PROVISION INVOLVED ..... 1

STATEMENT OF THE CASE ..... 1

REASONS FOR GRANTING THE WRIT ..... 7

I. THE LOWER COURTS ARE IRRECONCILABLY DIVIDED ON THE QUESTION OF WHEN ACCUSATIONS MADE TO A RESPONDING OFFICER ARE TESTIMONIAL ..... 7

II. THE DECISION BELOW REACHES AN INTOLERABLE RESULT THAT WOULD SIGNIFICANTLY UNDERMINE THE CONFRONTATION RIGHT ..... 13

A. Even Taken On Its Face, the Decision Below States an Inappropriate Standard. ..... 13

B. The Ruling of the Court Below Invites Manipulation. ..... 17

III. THIS CASE IS AN IDEAL VEHICLE FOR REFINING THE MEANING OF THE TERM "TESTIMONIAL." ..... 24

CONCLUSION. ..... 26

APPENDIX A. Opinion of the Indiana Supreme Court ..... A1

APPENDIX B. Opinion of the Indiana Court of Appeals ..... A17

APPENDIX C. Excerpts from Trial Transcript ..... A26

APPENDIX D. Excerpts from Record on Appeal ..... A33

## TABLE OF AUTHORITIES

### CASES


*Bourjaily v. United States*, 483 U.S. 171 (1987) ..... 17

*California v. Green*, 399 U.S. 149 (1970) ..... 18

*Crawford v. Washington*, 541 U.S. 36 (2004) ..... passim

*Drayton v. United States*, ___ A.2d ___, 2005 WL 1413862 (D.C. June 16, 2005) ..... 12

*Gay v. State*, 611 S.E.2d 31 (Ga. 2005) ..... 8

*Leavitt v. Arave*, 383 F.3d 809 (9th Cir.2004) ..... 11

*Lopez v. State*, 888 So. 2d 693 (Fla. App. 2004) ..... 8

*Mason v. State*, ___ S.W.3d ___, 2005 WL 1531286 (Tex. App. June 30, 2005) ..... 8

*Miller v. State*, ___ S.E.2d ___, 2005 WL 1423393 (Ga. App. June 20, 2005) ..... 8

*Miranda v. Arizona*, 384 U.S. 436 (1966) ..... 15-16, 25

*Moody v. State*, 594 S.E.2d 350 (Ga. 2004) ..... 8

*Mungo v. Duncan*, 393 F.3d 327 (2d Cir. 2004) ..... 11

*Ohio v. Roberts*, 448 U.S. 56 (1980) ..... 9

*People v. Geno*, 683 N.W.2d 687 (Mich. App. 2004) ..... 25

*People v. Jimenez*, 2004 WL 1832719 (Cal. App. 2d Dist. Aug. 17, 2004), *review denied*, Nov. 17, 2004, *cert. denied*, 125 S.Ct. 1713 (2005) ..... 11

*People v. Sisavath*, 13 Cal. Rptr.3d 753 (Cal. App. 2004) ..... 25

*Rhode Island v. Innis*, 446 U.S. 291 (1980) ..... 15

*Stancil v. United States*, 866 A.2d 799 (D.C. 2005) ..... 12

*State v. Banks*, 2004 WL 2809070 (Ohio App. 10th Dist. 2004) ..... 9

*State v. Barnes*, 854 A.2d 208 (Me. 2004) ..... 11

*State v. Branch*, 865 A.2d 673 (N.J. 2005) ..... 8-9

*State v. Davis*, 111 P.3d 844 (Wash. 2005), *petition for cert. filed* (Jul 8, 2005) (No. 05-5224) ..... 25

*State v. Ferguson*, 607 S.E.2d 526 (W.V. 2004), *petition for cert. filed* 73 U.S.L.W. 3604 (Apr. 1, 2005) (No. 04-1328) ..... 24

*State v. Grace*, 111 P.3d 28 (Haw. App. 2005) ..... 9

*State v. Greene*, 874 A.2d 750 (Conn. 2005) ..... 12

*State v. Hembertt*, 696 N.W.2d 473 (Neb. 2005) ..... 12

*State v. Meeks*, 88 P.3d 789 (Kans. 2004) ..... 10

*Thompson v. Trevanion.*, Skin. 402, 90 Eng. Rep. 179 (K.B.1694) ..... 10, 23

*United States v. Arnold*, 410 F.3d 895 (6th Cir. 2005) ..... 8

*United States v. Brun*, ___ F.3d ___, 2005 WL 1797451 (8th Cir. Aug. 1, 2005) ..... 9

*United States v. Canady*, 2005 WL 1637861 (4th Cir. Jul. 13, 2005) (unpublished) ..... 17

*United States v. Luciano*, ___ F.3d ___, 2005 WL 1594576 (1st Cir. Jul. 8, 2005) ..... 9

*United States v. Summers*, ___ F.3d ___, 2005 WL 1694031 (10th Cir. Jul. 21, 2005) ..... 8, 25

*Watson v. State*, 604 S.E.2d 804 (2004) ..... 8

*White v. Illinois*, 542 U.S. 346 (1992) ..... 5, 7

## STATUTES AND RULES

28 U.S.C. § 1257(a) ..... 1

Fed. R. Evid. 803(2) ..... 10

Indiana Code 35-42-2-1 ..... 3

Indiana Rule of Evidence 803(2) ..... 5, 10, 23

## OTHER AUTHORITIES

J.M. BEATTIE, CRIME AND THE COURTS IN ENGLAND, 1660-1800 ..... 14

Richard D. Friedman, *Grappling with the Meaning of "Testimonial"* (forthcoming, BROOKLYN L. REV.; preliminary draft available at http://confrontationright.blogspot.com/2005/02/grappling-with-meaning-of-testimonial.html) ..... 16, 25

Richard D. Friedman & Bridget McCormack, *Dial-In Testimony*, 150 U. PA. L. REV. 1171 (2002) ..... 14, 25

Amy Karan & David M. Gersten, *Domestic Violence Hearsay Exceptions in the Wake of Crawford v. Washington*, 13 JUVENILE AND FAMILY JUSTICE TODAY, No. 2 (Summer 2004) ..... 26

Tom Lininger, *Prosecuting Batterers After* Crawford, 91 Va. L. Rev. 747 (2005) ..... 8

## PETITION FOR A WRIT OF CERTIORARI

Hershel Hammon respectfully petitions for a writ of certiorari to the Indiana Supreme Court in *Hammon v. State*, No. 52S02-0412-CR-510.

## OPINIONS BELOW

The opinion of the Indiana Supreme Court is reported at 829 N.E. 2d 444 (Ind. 2005), and is attached at A1-A16. The opinion of the Indiana Court of Appeals is published at 809 N.E.2d 945 (Ind. App. 2004), and is attached at A17-A25. The relevant order of the trial court is unpublished.

## STATEMENT OF JURISDICTION

The Indiana Supreme Court issued its opinion on June 16, 2005. App. 1. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

## CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."

## STATEMENT OF THE CASE

This case presents a scenario that recurs frequently: Police officers come to the scene of a reported crime, and a declarant, typically the alleged victim, makes an accusatory statement to one of the officers. At the trial of the accused, the declarant does not testify, the prosecution offers evidence of the statement made by the declarant to the responding officer, and the accused objects that, unless he is given an opportunity to cross-examine the declarant, use of the statement violates his right under the Confrontation Clause "to be confronted with the witnesses against him." Since this Court's transformative decision in *Crawford v. Washington*, 541 U.S. 36 (2004), some courts have recognized

that admitting such evidence is improper, because it would effectively allow a prosecution witness to testify at the scene of the crime, without subjecting herself to the procedures – most notably cross-examination – that the Constitution affords the accused. But other courts, including the Indiana Supreme Court in this case, have treated such statements as non-testimonial, and so beyond the scope of *Crawford*. This case therefore reflects a clear and important conflict among the lower courts. It is a conflict that only this Court can resolve. The public interest calls for it to be resolved promptly. And, if *Crawford* is not to be substantially undercut and subject to manipulation, the judgment of the Indiana Supreme Court should be reversed.

Responding to a report of a domestic disturbance, Officers Jason Mooney and Rod Richard of the Peru Police Department came to the house of Petitioner Hershel Hammon and his wife Amy on the evening of February 26, 2003. Amy was the first person they encountered; according to Mooney's testimony at trial, she appeared to be "timid" and "frightened." Mooney testified that he asked whether there was a "problem" or "anything was going on," and that Amy replied in the negative. 829 N.E.2d at 446-47.

Mooney sought and received permission from Amy to enter the house. There he found indications of an altercation: In the corner of the living room, the glass front of a gas heating unit was broken, with fragments of the glass on the floor and flames emerging as a result. *Id.* at 447. Mooney found petitioner in the kitchen and asked what had happened. Petitioner answered that he and Amy had "been in an argument" but that it "never became physical" and "everything was fine now." *Id.* Richard remained with Hershel in the kitchen while Mooney went to speak with Amy once again. This time, according to Mooney's testimony,

> She informed me that she and Hershel had been in an argument. That he became irrate [sic] over the fact of their daughter going to a boyfriend's house. The argument became . . . physical after being verbal and she informed me that Mr. Hammon, during the verbal part of the argument was breaking things in the living room and I believe she stated he broke the phone, broke the lamp, broke the front of the heater When it became physical he threw her down into the glass of the heater She informed me Mr. Hammon had pushed her onto the ground, had shoved her head into the broken glass of the heater and that he had punched her in the chest twice I believe.

*Id.* Mooney then asked that Amy compete and sign a battery affidavit, and she did so *Id.* The affidavit was on a prepared fill-in-the-blank form that Mooney apparently had with him and that tracked the language of the battery statute, IC 35-42-2-1, by alleging in general terms that the defendant "did knowingly touch" the victim "in a rude, insolent and angry manner," resulting in bodily injury to the victim. Record on Appeal [hereinafter R.A.] 40, p. A35.. In the longest blank, which contained the instruction "Describe the Acts," Amy wrote the following:

> Broke our furnace and shoved me down on the floor into the broken glass and hit me in the chest and threw me down. Broke our lamps and phone. Tore up my van where I couldn't leave the house. Attacked my daughter.

829 N.E.2d at 447 n.1. She then signed her name twice, once under an acknowledgment that the "investigating officer" was relying upon her allegations "as establishing Probable Cause for the arrest of the defendant on the charge of Battery under IC 35-42-2-1." and once under an affirmation that the representations in the affidavit were true, that she understood the provisions of the "false informing statute," and that she was reporting a crime. R.A. 40, p. A35.

The State charged Petitioner with Domestic Battery, a Class A misdemeanor. On May 9, 2003, the Circuit Court of Miami County held a bench trial on this charge, consolidated with a hearing on an allegation that the incident violated the terms of

Petitioner's probation on an earlier battery conviction. Amy was not present at the consolidated proceeding. Although the state had subpoenaed her, it never made any attempt to show that she was unavailable for trial. Over Petitioner's objections, the court admitted both Officer Mooney's testimony reporting Amy's oral statements and Amy's affidavit. The court rejected hearsay objections on the grounds that the oral statement fit within the excited utterance exception to the hearsay rule and that the affidavit was a present sense impression. The only other evidence was brief testimony by the secretary of the county probation department establishing Petitioner's probation status. Petitioner offered no evidence.

The trial court convicted Petitioner of Domestic Battery and also found that he had violated the terms of his probation. The court sentenced Petitioner to a prison term of one year, with all but twenty days suspended. It also instructed him to complete a drug and alcohol evaluation and a counseling program.

Petitioner took an appeal to the Indiana Court of Appeals, which affirmed the decision of the trial court in material part.[1] The appellate court agreed with the trial court that Amy's oral statement was an excited utterance. Because this Court decided *Crawford* while the appeal was pending, the court of appeals considered whether the oral statement was testimonial within the meaning of *Crawford*.[2] Under *Crawford*, if the

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[1] The appellate court reversed the trial court's decision that Petitioner's cash bond be retained.

[2] In objecting at trial to the admission of Amy's statements, Petitioner's counsel did not invoke the Confrontation Clause by name, but he made a continuing objection on grounds of hearsay to her statements. Trial Transcript [hereinafter T.T.] 10, p. A26, and with respect to the affidavit he elaborated vigorously that he did not have the opportunity to cross-examine the alleged drafter. "Makes me mad," he said. T.T. 13, p. A29. Given that the case was tried before this Court's decision in *Crawford*, Petitioner can hardly be

statement was testimonial in nature, it could have been admitted against Petitioner only if he had an opportunity to cross-examine Amy *and* she were shown to be unavailable, but neither of these conditions was true. The court held, however, that the statement was not testimonial, and it concluded that admission of the statement did not violate Petitioner's rights under the Confrontation Clause. The court did not reach the question of whether admission of the affidavit was erroneous, because it concluded that the affidavit was "cumulative" of the report of Amy's oral statement, so any error in admitting the affidavit was harmless. In reaching the conclusion that Amy's oral statement was not testimonial, the court emphasized that the statement lacked a formal quality and that the statement was not, in its view, made in response to interrogation.

The Indiana Supreme Court granted a petition for transfer, *Hammon v. State*, 2004 Ind. LEXIS 1031 (Ind. Dec. 9, 2004), but it affirmed the ruling of the trial court with respect to Petitioner's conviction.[3] While recognizing that it was "unclear precisely how much time had passed between the event and the statement," the court agreed with the lower courts that Amy's statement was excepted from the rule against hearsay as an excited utterance under Indiana Rule of Evidence 803(2). The court then turned to the Confrontation Clause issue, focusing on the meaning of the term "testimonial." After reviewing the decisions of the court of appeals in this case and of courts from other

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faulted for not making an explicit Confrontation Clause objection in addition to the hearsay objection; before *Crawford*, if the statement fit within the excited utterance exception to the hearsay rule, that would resolve any Confrontation Clause objection. White v. Illinois, 542 U.S. 346 (1992). In any event both the court of appeals and the supreme court treated the Confrontation Clause objection as being preserved and reached the merits of it.

[3] The State did not contest the ruling of the court of appeals with respect to the cash bond, and the supreme court summarily affirmed the ruling of the court of appeals on that point.

jurisdictions, the supreme court distanced itself from the court of appeals' analysis but nevertheless concluded that

> a testimonial statement is one given or taken in significant part for purposes of preserving it for potential future use in legal proceedings. In evaluating whether a statement is for purposes of future legal utility, the motive of the questioner, more than that of the declarant, is determinative, but if either be principally motivated by a desire to preserve the statement it is sufficient to render the statement "testimonial." If the statement is taken pursuant to established procedures, either the subjective motivation of the individual taking the statement or the objectively evaluated purpose of the procedure is sufficient.

829 N.E.2d at 456.

Focusing on *Crawford*'s reference to statements made in "police interrogations," the supreme court drew the inference that such an interrogation "is properly limited to attempts by police to pin down and preserve statements rather than efforts directed to determining whether an offense has occurred, protection of victims or others, or apprehension of a suspect." Thus, "responses to initial inquiries by officers arriving at a scene are typically not testimonial." 829 N.E.2d at 457.

Turning to the facts of the case before it, the supreme court asserted that "the motivations of the questioner and declarant are the central concerns." Though it noted the absence of findings on point, the court then concluded that what it characterized as "the initial exchange between Mooney and Amy"

> fell into the category of preliminary investigation in which the officer was essentially attempting to determine whether anything requiring police action had occurred and, if so, what. Officer Mooney, responding to a reported emergency, was principally in the process of accomplishing the preliminary tasks of securing and assessing the scene. Amy's motivation was to convey basic facts and there is no suggestion that Amy wanted her initial responses to be preserved or otherwise used against her husband at trial.

829 N.E.2d at 457-58. Thus, the court held that Amy's oral statements were not testimonial, and there was no error in admitting them. The court also held that admission

of the affidavit violated Petitioner's confrontation right, and it indicated that if the case were tried to a jury the error may not have been harmless, despite the fact that it "merely repeated the substance of Amy's statements to Officer Mooney," because "the formality of the affidavit may have lent credibility in a jury's mind." But, given that the case was tried to the bench, the court concluded that the error was harmless. 829 N.E.2d at 459. Accordingly, Petitioner's conviction was affirmed. Petitioner now seeks review of the supreme court's judgment.

## REASONS FOR GRANTING THE WRIT

### I. THE LOWER COURTS ARE IRRECONCILABLY DIVIDED ON THE QUESTION OF WHEN ACCUSATIONS MADE TO A RESPONDING OFFICER ARE TESTIMONIAL.

Probably the most frequently litigated, and the most hotly contested, issue in light of *Crawford* is that of what might be called a fresh accusation – that is, a statement made to a police officer or other person affiliated with the criminal justice system and making an accusation that another person committed a crime a short time before. This case is a good example of one of the principal species within that genus – here, the accusation was made not in an emergency telephone call to a 911 system but to a police officer responding at the scene. In most of these cases, the statement escapes the rule against hearsay because it is deemed to fit within the exception for excited utterances, or spontaneous declarations. Before *Crawford*, that would have been enough to satisfy the Confrontation Clause as well, because that exception was deemed to be "firmly rooted." *White v. Illinois*, 542 U.S. 346 (1992). But under *Crawford*, characterizing the statement as an excited utterance does not address the confrontation question.

It does not require profusion of citations to demonstrate that the lower courts are divided in how to treat these cases. Indeed, the Indiana Supreme Court reviewed the division in its opinion in this case. 829 N.E.2d at 452-56. *See also, e.g.*, Tom Lininger, *Prosecuting Batterers After* Crawford, 91 VA. L. REV. 747, 779 (2005) ("Courts that scrutinize victims' statements to responding officers look to a long list of considerations, and apply these considerations inconsistently.").

At one end are courts that apply what we believe to be the proper test. They regard as testimonial all accusations that the declarant could reasonably expect to be used to help prosecute the accused. Accusations made to responding officers clearly fit within this category, as do many statements made in 911 calls. This conclusion is not altered by the possibility that the declarant may have had other purposes in making the statement, because the question is the expectation of a reasonable person in the declarant's position rather than the subjective purpose of the particular declarant. *E.g.*, *United States v. Arnold*, 410 F.3d 895, 903-04 (6th Cir. 2005); *United States v. Summers*, ___ F.3d ___, 2005 WL 1694031 (10th Cir. Jul. 21, 2005) (utterance deemed to be an assertion made by *conspirator* of accused to arresting officer held to be testimonial); *Moody v. State*, 594 S.E.2d 350, 354 n.6 (Ga. 2004) ("the [*Crawford*] Court stated that the term [testimonial] certainly applies to statements made in a police interrogation, and it appears that the term encompasses the type of field investigation of witnesses at issue here"); *Gay v. State*, 611 S.E.2d 31 (Ga. 2005) (quoting *Watson v. State*, 604 S.E.2d 804 (Ga. 2004): "statements made to police officers during an investigation qualify as testimonial").[4] *See also State*

[4] *Accord, e.g.*, Miller v. State, ___ S.E.2d ___, 2005 WL 1423393 (Ga. App. June 20, 2005) (holding that statement made to responding officer by "extremely upset" complainant alleging domestic violence was testimonial); Mason v. State, 2005 WL 1531286 (Tex. App. June 30, 2005); Lopez v. State, 888 So.2d 693 (Fla. App. 2004);

*v. Branch*, 865 A.2d 673 (N.J. 2005) (holding, against the weight of recent precedent and after extensive discussion of *Crawford* and "analysis . . . informed by the principles undergirding the Confrontation Clause jurisprudence of [the] federal and state constitutions," that excited utterance exception did not apply to accusation made to responding officer).

At the other end of the spectrum are courts that hold that if a statement fits within the excited utterance exception to the rule against hearsay, it cannot be testimonial. *E.g. United States v. Luciano*, 2005 WL 1594576 (1st Cir. Jul. 8, 2005) ("the initial statement that Camacho made to Officer Thornton when Camacho flagged down the Officer's cruiser immediately following the assault does not constitute 'testimonial hearsay' as used in *Crawford*. Instead, Camacho's statement appears to be an excited utterance that would qualify for admission at trial under as [*sic*] a hearsay exception."); *United States v. Brun*, ___ F.3d ___, 2005 WL 1797451 (8th Cir. Aug. 1, 2005) (after holding that statements made in 911 calls were excited utterances and not testimonial, holding that statements made to responding officer ten minutes later "were also excited utterances, *and therefore* nontestimonial statements")(emphasis added); *accord, e.g., State v. Banks*, 2004 WL 2809070 (Ohio App. 10th Dist. 2004) ("The holding in *Crawford* only applies to statements . . . that are not subject to common-law exceptions to the hearsay rule, such as excited utterance or present sense impression."). We believe these courts simply misread *Crawford*. Qualification under a "firmly rooted" hearsay exception was enough to satisfy the pre-*Crawford* reliability test of *Ohio v. Roberts*, 448 U.S. 56 (1980). It says nothing about whether the statement should be deemed to be testimonial under *Crawford*.

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State v. Grace, 111 P.3d 28 (Haw. App. 2005).

*Id.*, 541 U.S. at 61, 68 ("Where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence . . . . [T]he Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination."). If spontaneity is ever a significant factor suggesting that a statement is not testimonial, that is true *at most* when the statement was "made 'immediat[ely] upon the hurt received, and before [the declarant] had time to devise or contrive any thing for her own advantage.' *Thompson v. Trevanion*, Skin. 402, 90 Eng. Rep. 179 (K.B.1694)." 541 U.S. at 58 n.8. This rigorous standard is far narrower than the modern hearsay exception for excited utterances articulated in Fed. R. Evid. 803(2) and counterparts in most states (including Indiana), which applies to "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition."

Finally, the largest group of courts, including the Indiana Supreme Court in this case, fall in the middle. These courts do not make the error of conflating the question of whether a statement is testimonial for purposes of the Confrontation Clause with a question concerning the bounds of a hearsay exception. And some of them would likely treat as testimonial a statement made in the circumstances involved in this case.[5] Nevertheless, courts in this group treat some accusatory statements made to police officers as non-testimonial even though a reasonable person in the declarant's position would anticipate prosecutorial use of the statement.

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[5] *See* State v. Meeks, 88 P.3d 789 (Kans. 2004) ("Officer Hall was arguably conducting an interrogation when he asked Green if he knew who shot him, thus making the response testimonial.").

These courts take a wide variety of approaches. Some of them, like the Indiana Court of Appeals in this case, regard such an accusation as non-testimonial unless it was made formally. *E.g., Mungo v. Duncan*, 393 F.3d 327 (2d Cir. 2004) (dictum); *People v. Jimenez*, 2004 WL 1832719 (Cal. App. 2d Dist. Aug. 17, 2004), *review denied*, Nov. 17, 2004, *cert. denied*, 125 S.Ct. 1713 (2005). We believe these courts stand logic on its head. The aim of the Confrontation Clause is to ensure that testimony be given under prescribed conditions. It therefore makes no sense to hold that if a statement is not given formally it is beyond the reach of the Clause; that is to treat a defect as a virtue.

Similarly, many courts hold statements to police officers to be non-testimonial unless they are made in response to interrogation. *E.g., Leavitt v. Arave*, 383 F.3d 809, 830 n.22 (9th Cir. 2004) (holding complainant's "statements to the police she called to her home" to be non-testimonial on the ground that "she, not the police, initiated their interaction. She was in no way being interrogated by them but instead sought their help in ending a frightening intrusion into her home."); *see also, e.g., State v. Barnes*, 854 A.2d 208, 211 (Me. 2004) (holding non-testimonial accusatory statements made *in police station* because they were made while complainant "was still under the stress of the alleged assault," she "went to the police station on her own, not at the demand or request of the police," and "she was not responding to tactically structured police questioning"). Again, we believe this principle is plainly wrong: Under it, a complainant could submit directly to the police, or for that matter to the court, a written accusation and it would not be deemed testimonial because it was not made in response to interrogation.

Finally, many courts, like the Indiana Supreme Court here, do not regard as testimonial an accusation of a serious crime made to a police officer as testimonial unless

the police have first "secured" and "assessed" the scene. *E.g., Stancil v. United States*, 866 A.2d 799 (D.C. 2005) ("Police who respond to emergency calls for help and ask preliminary questions to ascertain whether the victim, other civilians, or the police themselves are in danger, are not obtaining information for the purpose of making a case against a suspect. Statements made to officers at this initial stage of the encounter – one might fairly call it 'securing the scene' – are not testimonial. . . . Here, where the responding officers were still principally in the process of accomplishing the preliminary tasks of securing and assessing the scene, we conclude that the statement elicited is not testimonial.") (internal quotation marks, brackets, deleted); *State v. Greene*, 874 A.2d 750 (Conn. 2005). They reach this conclusion despite the fact that a reasonable person in the complainant's position would understand that the accusation would almost certainly be used in prosecution of the accused – and no matter how much that prospect may have motivated her to make the accusation. These courts regard such statements as non-testimonial because *the recipient* of the statement had not drawn conclusions about the situation *until the statement was made*. But these courts would deem the identical statement to be testimonial if the police have already arrested the accused on the basis of other, similar statements – which would not be regarded as testimonial. *See State v. Hembertt*, 696 N.W.2d 473 (Neb. 2005); *Drayton v. United States*, 2005 WL 1413862 (D.C. June 16, 2005).

No short summary can fully capture the range of approaches used by the lower courts on the question presented here, but we believe it is apparent that the conflict is sharp, irreconcilable, and important. Nothing will be gained by postponing this Court's

resolution of the matter. The conflict cannot be resolved without a decision by this Court. Delay will not shed any further light.

Delay would, on the other hand, entail severe costs. Every month, courts decide many cases fitting the mold of this one. If our analysis is wrong, then courts that exclude accusations in circumstances resembling those of this case would be needlessly and irrevocably impairing prosecutions. But if our analysis is right, then the greater number of courts would be violating a basic constitutional right of accused persons, and gratuitously tainting convictions in the process.

## II. THE DECISION BELOW REACHES AN INTOLERABLE RESULT THAT WOULD SIGNIFICANTLY UNDERMINE THE CONFRONTATION RIGHT.

Consideration of the opinion of the Indiana Supreme Court further demonstrates why it is necessary for this Court to resolve the question presented here. The opinion is thoughtful and gives the appearance of moderation. But we believe it makes several key analytical errors -- and the result it reaches is appalling. That result would allow virtually all oral accusations made to a police officer at the scene of a crime to be admitted against the person accused. The police would be offered a clear channel for evasion of *Crawford*. "Ask open-ended questions at the scene, repeatedly if need be; put nothing on paper until an accusation is made; and be prepared to testify that until that time you were unsure whether a crime had been committed."

### A. Even Taken On Its Face, the Decision Below States an Inappropriate Standard.

We will suggest below that the standard articulated by the Indiana Supreme Court is not the one that the court actually applied. But taking the decision on its face, we believe the standard that the court articulated incorporates three fundamental errors.

First, *under that standard the question of whether a statement is deemed to be testimonial is determined principally from the perspective of the questioner*. But this is plainly incorrect, because the participation of a questioner is not a prerequisite for a statement to be testimonial in nature. Suppose Amy had gone to the police station on her own initiative and said, "Here is an affidavit relating a battery committed on me by my husband. I hope you will use it to help convict him of the crime." Clearly, this is testimonial even though there was no questioner. The same conclusion would hold if she wrote her accusation in the form of a letter to a friend, and asked the friend to relay the accusation to the police. The Confrontation Clause gives the accused the right to confront the witnesses against him. The right would apply even if there were no police or even if – as was true until the 19th century – most crime was privately prosecuted. J.M. BEATTIE, CRIME AND THE COURTS IN ENGLAND, 1660-1800, at 35-36 (1986), *quoted in* Richard D. Friedman & Bridget McCormack, *Dial-In Testimony*, 150 U.PA. L. REV. 1171 1248 (2002) [hereinafter Friedman & McCormack, *Dial-In*]. It is true, as *Crawford* said, that "[i]nvolvement of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse . . . ." 541 U.S. at 55 n.7. But police officers and other government officials do not violate the Confrontation Clause by taking testimonial statements without offering the accused an opportunity to confront the witness; good police work will often require taking statements privately, as presumably it did in *Crawford* and in this case. The Clause is violated only when a court admits the statement in support of a prosecution without the accused having an opportunity to confront the witness. That the statement in question was made to a government officer who was openly attempting to gather evidence for use in a

prosecution may be a significant factor supporting the conclusion that the statement is testimonial; that was true in *Crawford* and it is true in this case as well. But for a statement to be deemed testimonial, it is not essential that it be received by a government officer, or that such an officer be motivated by a desire to record evidence for trial.

Second, *under the decision of the Indiana Supreme Court, the critical question is one of motivation rather than anticipation*. That court speaks repeatedly of motivation and purpose. But this, we submit, is the wrong inquiry; instead, the question should be whether a reasonable person in the position of the declarant would *anticipate* use of the statement in litigation. Assume, as we have argued above, that the perspective of the witness-declarant is the proper one.[6] Many different motivations may impel a witness to

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[6] Even if, which we do not believe is true, the perspective of a police questioner is critical, the question is one of anticipation rather than motivation. In discussing the meaning of "interrogation," *Crawford* emphasized that it was using the term "in its colloquial, rather than any technical legal, sense," 541 U.S. at 53 n.4, and cited for comparison Rhode Island v. Innis, 446 U.S. 291, 300-01 (1980). In *Innis*, the Court held that

> the term "interrogation" under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police *should know are reasonably likely* to elicit an incriminating response from the suspect.

(Emphasis added.)

Assuming *arguendo* that a concept of interrogation has significance for Confrontation Clause purposes, that concept must be at least as broad as the corresponding concept under *Miranda*. *Innis* explained that "[t]he concern of the Court in *Miranda* was that the interrogation environment created by the interplay of interrogation and custody would subjugate the individual to the will of his examiner and thereby undermine the privilege against compulsory self-incrimination." 446 U.S. at 299 (citation and internal quotation marks omitted). Thus, interrogation under *Miranda* "must reflect a measure of compulsion above and beyond that inherent in custody itself." *Id.* at 300. Of course, this is not true in the confrontation context: If the police, without any element of compulsion, question a witness who is entirely willing to incriminate the accused, and the accused never has an opportunity for cross-examination, the violation of the Confrontation Clause is clear.

make a testimonial statement: She may be responding to pressure, believing that her own status in the criminal justice system or other interests of hers (such as her ability to maintain custody of her children) are dependent on her making an accusation to the authorities. In some such cases, she might desire that the statement will never be used against the person she has accused. Or she might make the statement for purposes of personal expiation, or catharsis, or to secure her immediate personal safety. *See* Richard D. Friedman, *Grappling with the Meaning of "Testimonial"* (forthcoming, BROOKLYN L. REV.; preliminary draft available at http://confrontationright.blogspot.com/2005/02/grappling-with-meaning-of-testimonial.html) [hereinafter Friedman, *Grappling*], at 6-7. In none of these cases does the actual motivation of the declarant diminish the testimonial nature of the statement: Whatever her inner motivation may have been, she has knowingly created evidence that a reasonable person understands will likely be used by the criminal justice system. The jurisprudence of the Confrontation Clause should recognize that such statements are testimonial without the need to flail about in the dark in an attempt to understand the speaker's psyche.

Third, *under the decision below, if the person taking the statement is principally motivated by a desire to preserve the statement for potential use in legal proceedings, that is sufficient to render the statement "testimonial."* This principle, we submit, would extend the confrontation right *too* far; indeed, it would require a major change in police

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Indeed, the comparison points out why, in contrast to the *Miranda* rule, the Confrontation Clause can be violated even absent an interrogation. *Miranda* concerns statements by the accused himself, and the essence of the problem is that he has made the statements under the compulsion of custodial interrogation. The Confrontation Clause concerns statements made by persons *other than* the accused, and the concern – that the accused has not had an opportunity to confront the witness – holds whether the witness spoke in response to interrogation or entirely on her own initiative.

investigative practices. Suppose a conspirator makes a statement in support of the conspiracy to an undercover police officer or a confidential informant, who surreptitiously records the statement for evidentiary purposes. We do not believe that such a statement has ever been considered to violate the confrontation right. *See Crawford*, 541 U.S. at 58 (citing with approval, as among the Court's cases that, "in their outcomes, hew closely to the traditional line," *Bourjaily v. United States*, 483 U.S. 171 (1987), which "admitted statements made unwittingly to a Federal Bureau of Investigation informant after applying a more general test that did not make prior cross-examination an indispensable requirement"); *United States v. Cunady*, 2005 WL 1637861 (4th Cir. Jul. 13, 2005) (unpublished) (statements made by conspirator to confidential informant held to be non-testimonial, "even under the broadest interpretation" of the term "testimonial," because declarant did not anticipate prosecutorial use). Nor should it be: The police officer may be trying to secure evidence from the declarant, as police secure evidence from many sources, non-human as well as human, but that does not make the process testimonial.

**B. The Ruling of the Court Below Invites Manipulation.**

The Indiana Supreme Court recognized that the Battery Affidavit written by Amy was testimonial; this point seems incontrovertible. But by holding Amy's oral statements to be non-testimonial, the court provided a clear path by which witnesses and police officers may cooperate in the creation of evidence that will not require the witness to subject herself to oath or cross-examination. First, the officer should conduct the interview at the scene of the alleged crime. Second, the officer should be prepared to testify that when he arrived at the scene the witness was still agitated or otherwise

appeared to be under the influence of the event in question and that until the witness made her critical statements he had not reached a conclusion as to whether a crime had been committed, and if so what. Third, until after the making of that statement, the officer should neither write anything down nor ask the witness to do so.[7]

If the officer follows this prescription, the prosecution can contend that the oral statement was procured to help "secure and assess" the scene, and under the Indiana Supreme Court's approach that will be enough for the statement to be characterized as non-testimonial and so avoid rigorous Confrontation Clause scrutiny. (It will also likely be enough for the statement to be characterized as an excited utterance, and so avoid a problem under hearsay law.) And this will be true irrespective of whether, in conducting the interview, the officer fully expected and hoped that the witness would accuse the defendant of a crime, and irrespective of the fact that, in making an accusatory statement to a police officer, a person of ordinary understanding in the witness's position would necessarily anticipate that the criminal justice system would in some way likely use the information just conveyed against the defendant.

This Court's decision in *Crawford* effectively ruled that testimony taken in the station-house rather than face-to-face with the accused and subject to cross-examination is not an acceptable method of proof. The decision of the Indiana Supreme Court in this case effectively rules that police may attain the same objective that *Crawford* denies

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[7] The Indiana Supreme Court recognizes that if the officer asks for a written statement as soon as the witness makes an oral one, that written statement is testimonial. Nevertheless, the officer has good reason to ask for such a statement then: If the witness testifies subject to cross-examination at trial, then, the Confrontation Clause "places no constraints at all on the use of his prior testimonial statements. See *California v. Green*, 399 U.S. 149, 162 (1970)." *Crawford*, 541 U.S. at 59 n. 9. And, under the decision of the Indiana Supreme Court, the officer has no reason *not* to ask for a written statement then, because doing so does not taint the conclusion that the oral statement was not testimonial.

them, by taking testimony at the crime scene instead. Ironically, the evidence allowed by the Indiana Supreme Court in this case is inferior to that rejected by *Crawford*. In *Crawford*, the statement was audiotaped, so that at least the jurors had no doubt about what the witness actually said and they could hear how Sylvia Crawford sounded as she made her statement. Here, all the trier of fact had to go on was the police officer's second-hand report of an oral statement made to him in the presence of no one else.

Consideration of the facts of the case confirms that, while the Indiana Supreme Court said that "responses to initial inquiries by officers arriving at a scene are typically not testimonial," in reality its decision amounts to a virtually *per se* rule that an oral accusation made to an officer at the scene of a crime before any formal recording has been made is not testimonial.

Note first that although Amy's accusation resulted from what the court characterized as "the initial exchange between Mooney and Amy," the *actual* initial exchange – the one that was made when the officers "arriv[ed] at [the] scene" – was utterly unproductive from the viewpoint of the officers and, later, the prosecution. In *that* exchange, Officer Mooney asked Amy whether there was a problem and she answered in the negative. It was only after the officers went inside the house, looked around, spoke to Petitioner, met Amy separately from the Petitioner, and pressed the matter again that she made the accusation that was indispensable to Petitioner's conviction.

The court nevertheless concluded that at the time Amy made this accusation Officer Mooney was still "principally in the process of accomplishing the preliminary tasks of securing and assessing the scene," and that "there is no suggestion that Amy wanted her initial responses [sic] to be preserved or otherwise used against her husband at trial." We

believe that the standard thus articulated by the court is incorrect, as we have explained above. But even apart form the question of standards, it is clear that the court applied inaccurately the standard it articulated. Consider the facts as Officer Mooney testified to them, virtually all of them elicited by the prosecution.

The officers arrived at the house in response to a report of a domestic disturbance. There they encountered Amy, who looked "somewhat frightened." (Of course, she had to look that way, for otherwise the "excited utterance" exception would not apply.) The officers declined to accept Amy's denial that anything untoward had happened ("I didn't feel safe leaving the premises when we were responding to a call of a fight due to her state of frighten[edn]ess" T.T. 18, p. A30), and went inside the house. There they saw signs of a recent physical disturbance – a broken gas heating unit, with flames emerging from it and glass lying on the floor in front. Officer Mooney inferred that the unit had been broken recently (T.T. 10, p. A26) and that this was the result of the altercation that had led to the report of a domestic disturbance.[8] The officers also met Petitioner, who acknowledged in response to a question that he and Amy had just had an argument; his denial that the dispute had become physical was clearly in his self-interest. *Cf.* T.T. 24, p. A31 (testimony by Mooney of his experience of batterers lying to him). The officers then insisted that Petitioner and Amy be separated: Officer Richard remained with

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[8] The exchange in Mooney's direct examination leading up to his description of the broken heating unit was as follows:

> Q In your opinion, was there something that you observed in the premises to indicate why you were dispatched to that location?
>
> A Yes.

T.T. 10, p. A26.

Petitioner in the kitchen. T.T. 24, p. A31, and Officer Mooney went to speak with Amy in the living room. T.T. 11, p. A27.[9] This time she made the critical accusation. *Id.*

And what did Officer Mooney do, armed with this new information, to assess and secure the scene? In compliance with his routine practice, he brought out an affidavit form for her to complete and sign, which she did.[10] There is no indication in the record that he had to leave the house to get the form.

In this setting, we submit, it is obvious that Officer Mooney did not take Amy's statement to "secure" the scene. The officers needed no new information to secure the scene: they knew who and where the protagonists were. Indeed, the scene was already secure – Amy and Petitioner were separated, one officer with each of them. In any event, Mooney's next move after receiving the oral statement did nothing to make the scene more secure. It was simply an effort to record evidence.[11]

We believe it is also obvious that, if Amy's statement is deemed to have been taken for the purpose of assessing the scene and not "in significant part for purposes of . . .

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[9] According to Mooney, Petitioner came into the living room at least twice while Mooney was speaking with Amy. T.T. 24, p. A31, and Mooney insisted that they remain separated so the officers could investigate. T.T. 26, p. A33.

[10] Q After your conversation with Mrs. Hammon, where did you direct your attention next? What did you do after you finished your conversation with Mr. [sic] Hammon?

A I had her fill out and sign a battery affidavit and I asked her if she would.

T.T. 12, p. A28.

[11] Q And what's the purpose of that document?

A To establish events that have occurred previously.

T.T. 12, p. A28.

potential future use in legal proceedings." 829 N.E.2d at 456, then there is a *per se* rule that a witness may make an oral accusation at the scene of a crime and not be subject to confrontation. Given that Mooney's very next step, pursuant to his routine, was to procure a written affidavit from her, it seems obvious that at least "in significant part" he took the oral statement "for purposes of . . . potential future use in legal proceedings."

Furthermore, by the time Amy made her accusation, Officer Mooney had, by his own account, considerable evidence, enough to press the matter a second time with Amy, that Petitioner had committed a battery on his wife – the original disturbance report, Amy's frightened demeanor, Petitioner's acknowledgment that there had been an argument, and the physical signs of a very recent disturbance. Of course, it was possible that no crime had been committed (and we do not admit that one had been), but that is always true; it is not the job of the investigating officer to determine guilt beyond a reasonable doubt. Even after hearing an accusation, the officer may have considerable doubt as to whether a crime has been committed. In any event, *before* an accusation has been made, the officer will always have – and will always be able to testify that he had significant doubt on that score. If that is enough to render a statement non-testimonial, as the Indiana Supreme Court held in this case, then the first accusation made orally and at the scene will never be deemed testimonial, no matter how strong the officer's understanding may be beforehand that one consequence of his efforts will be the gathering of evidence for potential use in prosecution.

Nor does the court's supposed consideration of Amy's motivation alter this fact. The court explicitly gave secondary importance to the declarant's motivation, 829 N.E.2d at 456, and it indicated in passing that Amy did not want her "initial responses" to be

used against Petitioner at trial. But the court provided no support for this conclusion, which we think is patently dubious at best. Whatever her reluctance and mix of feelings, Amy was making a knowing accusation of a serious crime to an investigating officer; the only plausible conclusion is that she anticipated prosecutorial use of this accusation, and she should be deemed to have intended this natural consequence of her actions.[12]

Finally, the statement cannot be deemed non-testimonial on the ground that it was spontaneous. The Indiana Supreme Court approved admission of the statement under the state's broadly applied excited utterance exception to the rule against hearsay (without even need for proof of how long before Amy made her statement the alleged incident occurred or the initial report of a domestic disturbance was made), but as discussed above that has no bearing on the Confrontation Clause question. And, whatever the significance of the more rigorous standard suggested by *Thompson v. Trevanion*, Skin. 402, 90 Eng. Rep. 179 (K.B.1694), may be, the statement clearly did not satisfy it. That is, the statement was not made "immediat[ely] upon the hurt received, and before [Amy] had time to devise or contrive any thing for her own advantage." By Officer Mooney's account, Amy clearly had more than ample "time to contrive," because her first response to his questions was to deny that there had been a problem; if the accusation she later made was true, then her initial denial was a deliberate falsehood.

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[12] In response to a question posed as part of the pre-sentence investigation, Petitioner said:

> My wife and I were arguing. My wife tryed [sic] to explain to officers that everything was fine and they told her that if she did not sign a statement against Her Husband [sic] they would take her children away.

R.A. 30, p. A34.

## III. THIS CASE IS AN IDEAL VEHICLE FOR REFINING THE MEANING OF THE TERM "TESTIMONIAL."

For several reasons, this case is an excellent one for the Court to begin refining the meaning of "testimonial" and thus giving clearer meaning to the scope of the Confrontation Clause.

First, this is an uncluttered case. The case comes to this Court on direct appeal. Its outcome is completely dependent on resolution of the merits of the Confrontation Clause issue. There is no question of harmless error: Indeed, it is clear that, apart from Amy's statements, there was not sufficient evidence to support a judgment that Petitioner had committed a battery on her. The only plausible federal ground on which her statements might be excluded is the Confrontation Clause. Petitioner has preserved the issue from the start. At trial, before this Court's decision in *Crawford*, he objected to introduction of statements by Amy on the ground that he had not had an opportunity for cross-examination, and after *Crawford* the state court of appeals and supreme court both considered the Confrontation Clause issue without any suggestion that the issue was not preserved.

Second, there is no issue of forfeiture here. That is, there is no basis on which the courts could have concluded that the Petitioner forfeited the confrontation right by wrongfully rendering the witness unavailable. *Cf. State v. Ferguson*, 607 S.E.2d 526 (W.V. 2004), *petition for cert. filed* 73 U.S.L.W. 3604 (Apr. 1, 2005) (No. 04-1328) (statements by murder victim).

Third, deciding the case would allow the Court, if it wished, to continue to take the prudent, step-by-step approach toward defining the Confrontation Clause that it took in

*Crawford*. Reversal here would require the Court only to say that conducting an interview early on at the alleged crime scene rather than somewhat later at the station house, and not making any record of the interview until after the witness makes the first accusatory statement, does not alter the fact that an accusation of crime knowingly made to the police is clearly testimonial. The Court would not have to resolve the issue of whether a statement can be testimonial even if not made to a government official. *compare, e.g., People v. Sisavath*, 13 Cal. Rptr.3d 753 (Cal. App. 2004) (holding in the affirmative), *with People v. Geno*, 683 N.W.2d 687 (Mich. App. 2004) (holding in the negative); the statement here *was* made to a government official. The Court would not have to resolve the issue of whether a statement can be testimonial even if a government official did not attempt to secure it; a government official *did* solicit this statement.[13] Nor would the Court have to resolve the issues surrounding statements made contemporaneously with the commission of a crime, as occurs most notably during some 911 calls.[14]

In deciding this case, the Court may wish to discuss further the general standard for determining what statements are testimonial. But the treatment by many lower courts of

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[13] To be clear, we believe that a statement can be testimonial even though not made to a government official and even though not made in response to interrogation. Friedman, *Grappling*, *supra*, at 10-16. Emphasizing that the key consideration is "the reasonable expectations of the declarant," the Court of Appeals for the Tenth Circuit has recently held that an utterance made to police was testimonial despite the fact that there had been no questioning and the speaker had not even been read his *Miranda* rights. *Summers*, *supra*, ___ F.3d at ___, 2005 WL 1694031, at *10.

[14] We believe that many statements made during 911 calls, such as those involved in *State v. Davis*, 111 P.3d 844 (Wash. 2005), *petition for cert. filed* (Jul 8, 2005) (No. 05-5224), are clearly testimonial. *See* Friedman & McCormack, *Dial-In*, 150 U.PA. L. REV. at 1242-43.

the type of statement involved here, accusations made to responding officers, suggests that mere discussion of standards will not be enough to persuade some courts that *Crawford*'s re-invigoration of the Confrontation Clause requires a significant change in the way they have been doing business. *Cf.* Amy Karan & David M. Gersten, *Domestic Violence Hearsay Exceptions in the Wake of* Crawford v. Washington, 13 JUVENILE AND FAMILY JUSTICE TODAY, No. 2 (Summer 2004) (arguing that courts can avoid *Crawford* by invoking the "excited utterance" exception). Whether the Court attempts to articulate general standards or not, forthright decision of a responding-officer case will put suitable emphasis behind *Crawford*. "We really mean it!" is the message that lower courts need to hear, and that decision of this case can send.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

RESPECTFULLY SUBMITTED this 5th day of August, 2005

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IN THE

# Supreme Court of the United States

HERSHEL HAMMON,

*Petitioner,*

v.

STATE OF INDIANA,

*Respondent.*

**On Petition for Writ of Certiorari to the Indiana Supreme Court**

## RESPONDENT STATE OF INDIANA'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## TABLE OF CONTENTS


TABLE OF AUTHORITIES ..... ii

QUESTION PRESENTED ..... 1

STATEMENT ..... 1

REASONS FOR DENYING THE PETITION ..... 3

CONCLUSION ..... 9

## TABLE OF AUTHORITIES

**Cases**

*Commonwealth v. Gonsalves*, ___ N.E. 2d ___, 2005 WL 2046000 (Mass. Aug. 29, 2005), ..... 5

*Crawford v. Washington*, 541 U.S. 36 (2004) ..... *passim*

*Dutton v. Evans*, 400 U.S. 74 (1970) ..... 8

*Mason v. State*, No. 05-04-00451-CR, 2005 WL 1531286 (Tex. Ct. App. June 30, 2005) ..... 5

*Ohio v. Roberts*, 448 U.S. 56 (1980) ..... 2

## QUESTION PRESENTED

Whether disclosure of a crime to a first-responding police officer a few minutes after the officer arrives is a testimonial statement within the meaning of *Crawford v. Washington*, 541 U.S. 36 (2004), when neither the declarant nor the officer acted with the intention of producing evidence for a criminal prosecution.

## STATEMENT

On February 26, 2003, Peru Police Department Officers Jason Mooney and Rod Richard responded to a domestic disturbance dispatch at the Hammon home. Pet. App. 3. Arriving at the scene, Officer Mooney encountered Amy Hammon on the porch of the house. *Id.* At first, Amy was timid or frightened while she spoke to Officer Mooney. *Id.* Officer Mooney asked if a problem existed and Amy answered "'No.'" *Id.* at 3-4. Amy told Officer Mooney that, "'nothing was the matter'" and "'that everything was okay.'" *Id.* at 4. Amy allowed Officer Mooney to enter her home. *Id.*

Upon entering the Hammon home, Officer Mooney noticed immediately that Amy's living room was in disarray. *Id.* A glass heating unit, apparently broken recently, sat shattered in the living room with flames escaping through the front. *Id.* at 26.

Officer Mooney encountered Hershel Hammon, the Petitioner, in the house. *Id.* Hershel told Officer Mooney that he and his wife had had an argument, but that it was over and had not become physical. *Id.* at 27. Officer Mooney separated Hershel and Amy and Officer Richardson remained with Hershel in the kitchen while Officer Mooney spoke with Amy in the living room. *Id.* at 27, 31.

After being separated from Hershel, Amy confirmed to Officer Mooney that she and Hershel had had an argument. *Id.* at 27. Amy told Officer Mooney that, while they argued verbally, Hershel had begun smashing living room furnishings, including the telephone, a lamp,

and the front of the heater. *Id.* Amy told Officer Mooney that Hershel had thrown her down onto the broken glass in front of the heater and pushed her to the ground, shoved her head into the broken glass of the heater and punched her twice in the chest. *Id.* at 27-28. Officer Mooney had Amy fill out and sign a battery affidavit. *Id.* at 28.

Officer Mooney did not observe any physical injuries on Amy. *Id.* at 20. However, Amy did indicate some pain as a result of the attack. *Id.* Hershel tried at least twice to enter the living room where Officer Mooney was speaking with Amy, and each time Amy became quiet, as though afraid to speak. *Id.* at 31.

Indiana charged Hershel with Class A misdemeanor domestic battery, and he was found guilty after a bench trial. *Id.* at 4. Amy was not present at the trial, despite the prosecutor's subpoena. *Id.* Over Hershel's continuing hearsay objections, the trial court admitted, as excited utterances, Officer Mooney's testimony reciting Amy's statements. *Id.*[1] The trial court sentenced Hershel to one year in jail, with all but twenty days suspended. *Id.*

Hershel appealed his conviction, claiming the trial court erred when it admitted Officer Mooney's testimony as to Amy's oral statements pursuant to the excited utterance exception to the rule against hearsay. *Id.* at 20. After the case was fully briefed, but before the decision was handed down, *Crawford v. Washington*, 541 U.S. 36 (2004), ruled that out-of-court testimonial statements are inadmissible under the Confrontation Clause absent declarant unavailability and prior opportunity for cross-examination, abrogating *Ohio v. Roberts*, 448 U.S. 56 (1980).

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[1] It should be noted that at trial the Petitioner did not make an explicit Confrontation Clause objection to Officer Mooney's testimony reciting Amy's statements. However, the trial occurred before this Court issued its decision in *Crawford v. Washington*, 541 U.S. 36 (2004), and the defense did raise a hearsay objection to Officer Mooney's testimony about Amy's statements. Pet. App. 4, 27. Furthermore, both the Indiana Court of Appeals and the Indiana Supreme Court have squarely addressed the issue presented in this case (*id.* at 3, 19) and the State has never argued, and is not now arguing, that the issue has been waived.

*Crawford* notwithstanding, the Indiana Court of Appeals affirmed the trial court's admission of Officer Mooney's testimony about Amy's oral statements, concluding that Amy's oral statements were not "testimonial" under *Crawford*. Pet. App. 24.

On discretionary review, the Indiana Supreme Court unanimously affirmed Hershel's conviction. *Id.* at 16. The court agreed with the Indiana Court of Appeals that Amy's oral statements to Officer Mooney qualified as excited utterances under Indiana Rule of Evidence 803(2) and were not "testimonial" under *Crawford*. *Id.* at 6, 10. The court stated that under *Crawford* "a 'testimonial' statement is one given or taken in significant part for purposes of preserving it for potential future use in legal proceedings." *Id.* at 13. Amy's oral statement was not testimonial because neither she nor Officer Mooney intended to produce evidence for trial. *Id.* at 13, 15. In fact, Officer Mooney's objective was merely to "accomplish[] the preliminary tasks of securing and assessing the scene." *Id.* at 15. The court also ruled that Amy's battery affidavit was inadmissible under *Crawford*, but that its admission was harmless error. *Id.* at 15-16.

## REASONS FOR DENYING THE PETITION

1. Review is not warranted because the Indiana Supreme Court's decision represents nothing more than an ordinary application of *Crawford v. Washington*, 541 U.S. 36 (2004), to one among a potentially infinite variety of factual circumstances where courts will need to determine whether a non-testifying witness's oral statement is "testimonial." Petitioner attempts to argue that the Indiana Supreme Court misstated the applicable law, but the petition cites no rule from *Crawford* or any other decision of this Court that the decision below supposedly contravened. *See* Pet. 13-17. In fact, in at least one place, the petition implicitly acknowledges that precedent supplies no contrary rule. *Id.* at 15 ("[The decision below] speaks repeatedly of

motivation and purpose. But this, *we submit*, is the wrong inquiry; instead, the question *should be* whether a reasonable person in the position of the declarant would *anticipate* use of the statement in litigation.") (emphasis added).

The Court's own rules, of course, state that a petition for writ of certiorari is "rarely granted" based on "misapplication of a properly stated rule of law." *See* Sup. Ct. R. 10. Yet the petition explicitly argues for consideration of the sort of error that Rule 10 says is generally unworthy of review: that the Indiana Supreme Court "applied inaccurately the standard it articulated." *Id.* at 20. That is, Petitioner seeks review because he believes that the Indiana Supreme Court applied *Crawford* erroneously to these facts. Such a complaint does not warrant review.

2. The petition also urges review based on quibbles with the evidentiary basis for the factual finding that Officer Mooney was not conducting an interrogation of Amy when she informed him that Hershel had battered her. The Indiana Supreme Court concluded that Officer Mooney was attempting to secure the scene, assess the situation, and determine whether a crime had been committed. Pet. App. 15. Petitioner objects to this characterization based on details in the transcript concerning Amy's initial statement when Officer Mooney arrived, the timing of Officer Mooney's conversation with Amy, and Amy's execution of an affidavit immediately after disclosing the crime. *See, e.g.*, Pet. 21. When Amy told Officer Mooney of the crime, Petitioner contends, "the scene was already secure" because Amy and Hershel were already separated. *Id.* Furthermore, the original disturbance report, according to Petitioner, was enough to inform Officer Mooney that a crime had already been committed. *Id.* at 22.

The Indiana Supreme Court, Petitioner argues, erred in its conclusion that, factually speaking, Officer Mooney was simply trying to determine what was going on when Amy told

him of the crime. Determining whether a particular officer in a particular set of circumstances had a particular mindset is not worth this Court's attention.

3. Nor do Petitioner's cases establish a well-developed, meaningful lower court conflict over the meaning of *Crawford*. The Indiana Supreme Court's decision, again, turned on whether Officer Mooney was, at the time of Amy's declaration, determining whether a crime had been committed or investigating a known crime. Pet. App. 15. In the Indiana Supreme Court's view, these circumstances were critical for purposes of determining whether Amy's statement was made in response to interrogation and was therefore testimonial. *Id.* at 14-15. However, only one of the many cases cited by Petitioner as being in conflict with this proposition (*Mason v. State*, No. 05-04-00451-CR, 2005 WL 1531286, at *6 (Tex. Ct. App. June 30, 2005)) plainly tracks all facts material to the Indiana Supreme Court's decision: (1) that neither declarant nor audience was acting with the purpose of creating evidence; and (2) that the police officer that elicited the statement did so before having evidence that a crime had been committed. Furthermore, the recent decision in *Commonwealth v. Gonsalves*, ___ N.E. 2d ___, 2005 WL 2046000 (Mass. Aug. 29, 2005), is distinguishable because there, unlike here, the defendant had left the scene when police arrived and there was no ongoing threat to be assessed through questioning.

As mentioned, Petitioner's essential argument is a factual dispute concerning whether the Indiana Supreme Court made an erroneous determination that Officer Mooney was merely attempting to determine whether a crime had been committed. Its resolution would not change the fact that this Court cannot know from the cases cited by Petitioner how other jurisdictions (besides Texas) would rule based on the same factual premise. This important distinction serves as a reminder that it may take much more time before the Court can discern authentic

discrepancies concerning how lower courts apply *Crawford*. This is a highly factual issue—one subject to incremental development over time.

4. The Indiana Supreme Court properly ruled that Amy's statements to Officer Mooney were not testimonial statements under *Crawford*. First, the decision below correctly concluded that *Crawford* does not prohibit admission of *all* un-cross-examined hearsay elicited by police officers. *Crawford* merely ruled that responses to police *interrogations* were testimonial, not that all responses to all garden-variety police questions were necessarily testimonial. *Crawford*, 541 U.S. at 52.

Nor did the decision below rely on a formalistic understanding of "interrogation." The court recognized that any question by a police officer can be described as a "police interrogation," especially in light of this Court's usage of the term "in its colloquial, rather than any technical legal, sense." *Id.* at 53 n.4. But the Indiana Supreme Court nonetheless arrived at a reasonable operational definition of "interrogation" based on *Crawford's* indication that the term would include "attempts by police to pin down and preserve statements rather than efforts directed to determining whether an offense has occurred, protection of victims or others, or apprehension of a suspect." Pet. App. 14.

5. Next, the Indiana Supreme Court properly concluded that the crucial inquiry in determining whether a statement is "testimonial" is whether the police elicited the statement, or whether the declarant gave the statement, for "use in legal proceedings" or "with an eye toward trial." *Id.* at 13. This inquiry is common to all formulations of "testimonial" presented in *Crawford*, 541 U.S. at 51-52, and it dovetails with *Crawford's* definitions of "witnesses" and "testimony." *Id.* It also protects against abuses "at which the Confrontation Clause was directed," namely those practices in "closest kinship" with the "use of *ex parte* examinations as

evidence against the accused," such as police questions designed to produce evidence. *Crawford*, 541 U.S. at 50, 68.

6. The Indiana Supreme Court's formulation of the "use in legal proceedings" standard also properly accounts for the point of view of both the declarant and the questioner. While initially holding that "the motive of the questioner, more than that of the declarant, is determinative," the court also observed that "if either is principally motivated by a desire to preserve the statement it is sufficient to render the statement 'testimonial.'" Pet. App. 13. Focusing principally on the officer's intent makes sense because it is the officer who best understands whether the police are asking questions to secure an area, to render emergency aid, to determine whether a crime has been committed or to investigate a crime and gather information for prosecution. *Id.* at 14. This does not render the motivation of declarants irrelevant, however. *Id.* Regardless of the motivation of the police officers, a declarant's intent to establish a record for prosecution can render the statement testimonial and subject to *Crawford*. *Id.* at 13.

Furthermore, Petitioner is incorrect to suggest that, under the test applied by the Indiana Supreme Court, the reasonable expectations of the declarant (as opposed to the subjective designs of the declarant) are irrelevant. *See* Pet. 17. The test employed by the Indiana Supreme Court presupposes that a reasonable person in the declarant's shoes would understand the possibility that the statement might be used in legal proceedings. Pet. App. 14. That is, if a reasonable person in the declarant's shoes would *not* have that expectation, then the subjective motivations of the audience to gather evidence for criminal prosecution would not render the statement testimonial. *Id.* Undercover investigations where coconspirators unwittingly disclose valuable information to police or other informants are therefore not imperiled by this rule. *See*

*Crawford*, 541 U.S. at 55 (observing statements in furtherance of a conspiracy are not testimonial by their nature); *see also Dutton v. Evans*, 400 U.S. 74, 81 (1970) (plurality opinion).

7. Based on all of these premises, the Indiana Supreme Court properly ruled that "responses to initial inquiries by officers arriving at a scene are typically not testimonial." Pet. App. 14. Considering the multiple functions of first-responding law enforcement officers, this is a sensible conclusion. Police officers responding to emergency dispatch instructions often need information from individuals present at the scene to assist them with providing security, to render aid to the injured or vulnerable, to assess the need for further investigation, and to conduct that investigation. It is only the final category of activity—soliciting information from individuals at the crime scene as part of an ongoing investigation—that *Crawford* renders testimonial. Where, as here, an officer asks questions of an individual only as a means to determine whether that individual is in danger or whether a crime has been committed, the statement elicited may properly be used at trial.

8. In sum, the Indiana Supreme Court applied *Crawford* to produce an easily discernible rule that will enable more predictable lower court applications. The "use in legal proceedings" standard will cure pre-*Crawford* Confrontation Clause abuses and still permit the use at trial of many statements to police officers in circumstances at which the Confrontation Clause was not directed. A broader exclusionary rule might discourage open communication between citizens and law enforcement officers under emergency circumstances—a result that this Court surely did not intend.

## CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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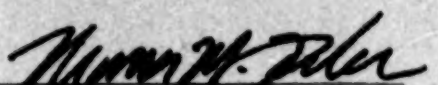
By: 
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No. 05-5705

# In the Supreme Court of the United States

HERSHEL HAMMON

*v.*

STATE OF INDIANA

*ON PETITION FOR WRIT OF CERTIORARI TO THE INDIANA SUPREME COURT*

## CERTIFICATE OF SERVICE

I certify that on September 8th, 2005, a true and complete copy of the Respondent State of Indiana's Brief in Opposition to Petition for Writ of Certiorari was served upon all counsel of record by first-class mail, U.S. Postal Service, postage prepaid, to the following:

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No. 05-5705

IN THE
SUPREME COURT OF THE UNITED STATES

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HERSHEL HAMMON,

Petitioner

v.

STATE OF INDIANA,

Respondent.

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On Petition for Writ of Certiorari to the
Indiana Supreme Court

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# PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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## TABLE OF CONTENTS

TABLE OF AUTHORITIES ..... ii

ARGUMENT ..... 1

CONCLUSION ..... 5

## TABLE OF AUTHORITIES

### CASES

*Commonwealth v. Gonsalves*, 833 N.E.2d 549 (Mass. 2005) ..... 3, 4-5

*Crawford v. Washington*, 541 U.S. 36 (2004) ..... 1, 3, 5

*Lopez v. State*, 888 So. 2d 693 (Fla. App. 2004) ..... 5

*Moody v. State*, 594 S.E.2d 350 (Ga. 2004) ..... 5

*Ohio v. Roberts*, 448 U.S. 56 (1980) ..... 1

*People v. Victors*, 819 N.E.2d 311 (Ill. App.2004) ..... 5

*State v. Wright*, 701 N.W.2d 802 (Minn. 2005) ..... 5-6

*United States v. Arnold*, 410 F.3d 895 (6th Cir. 2005) ..... 4, 5

*United States v. Cromer*, 389 F.3d 662 (6th Cir.2004) ..... 3, 4

*United States v. Hinton*, ___ F.3d ___, 2005 WL 2218919 (3d Cir. Sept. 14, 2005) ..... 4-5

*United States v. Saget*, 377 F.3d 223 (2d Cir.2004) ..... 3

*United States v. Summers*, 414 F.3d 1287 (10th Cir.2005) ..... 2-3

## ARGUMENT

The State attempts to portray this case as if the doctrine governing it were well developed, so that the dispute concerns only the particular facts of the case or at most the application of settled doctrine to those facts.[1] The reality is starkly different: As recognized by the majority in *Crawford v. Washington*, 541 U.S. 36 (2004), by the justices who declined to join that majority, and by the Indiana Supreme Court in this case, the decision in *Crawford* left fundamental questions unsettled.[2] The decision of the Indiana Supreme Court in this case rests on its resolution of some of those questions resolutions that are in clear conflict with those reached by many other courts.

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[1] *E.g.*, Respondent State of Indiana's Brief in Opposition to Petition for Writ of Certiorari [hereinafter "BIO"], at 3 ("the Indiana Supreme Court's decision represents nothing more than an ordinary application of *Crawford v. Washington*, 541 U.S. 36 (2004), to one among a potentially infinite variety of factual circumstances . . ."), 4 ("quibbles with the evidentiary basis for the factual finding that Officer Mooney was no conducting an interrogation of Amy").

[2] The *Crawford* majority said, "We leave for another day any effort to spell out a comprehensive definition of 'testimonial.'" 541 U.S. at 68. Chief Justice Rehnquist objected that

> the thousands of federal prosecutors and the tens of thousands of state prosecutors need answers as to what beyond the specific kinds of "testimony" the Court lists. . . . is covered by the new rule. They need them now, not months or years from now. Rules of criminal evidence are applied every day in courts throughout the country, and parties should not be left in the dark in this manner.

Id. at 75-76 (Rehnquist, C.J., concurring in the judgment). The majority explicitly "acknowledge[d]" the objection that its "refusal to articulate a comprehensive definition" in *Crawford* would "cause interim uncertainty." The majority did not belittle the problem, but rather pointed out that its decision did not worsen the situation, given the inherent, and therefore permanent, uncertainty created by the discarded rule of *Ohio v. Roberts*, 448 U.S. 56 (1980). 541 U.S. at 68 n.10.



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According to the State, "Petitioner's essential argument is a factual dispute concerning whether the Indiana Supreme Court made an erroneous determination that Officer Moody was merely attempting to determine whether a crime had been committed." BIO. at 5. The State's assertion appears to reflect a misunderstanding of our argument. We contend that the Indiana Supreme Court applied an incorrect legal standard that is in conflict with the legal standard adopted by several other jurisdictions. Under the correct standard, we contend, Amy Hammon's accusatorial statement was testimonial *whatever* Officer Mooney's motivation may have been in soliciting it – and it would be testimonial even if Officer Mooney had not solicited it.

According to the Indiana Supreme Court, the critical question is one of motive – whether the statement was "given or taken in significant part for purposes of preserving it for potential future use in legal proceedings." 829 N.E.2d at 456 – and "the motive of the questioner, more than that of the declarant, is determinative." *Id.* As we explained in our petition, we believe this is incorrect – and in conflict with other jurisdictions – on both counts: The question is one of anticipation, rather than motive, and it is the anticipation of the declarant that is critical.[3] *See, e.g., United States v. Summers*, 414 F.3d 1287, 1302 (10th Cir.2005) ("[W]e believe [that in comparison to a narrower approach] an objective test focusing on the reasonable expectations of the declarant under the circumstances of the case more adequately safeguards the accused's confrontation right and more closely reflects the concerns underpinning the Sixth Amendment. Thus we

[3] In addition, the "for purposes of preserving it" language is at best very misleading. In light of the Indiana Supreme Court's decision in this case, it appears that this phrase means that an oral accusation will not be deemed testimonial – even if (as in this case) it is made directly to police officers and is followed up immediately by a written affidavit of the same effect.

hold that a statement is testimonial if a reasonable person in the position of the declarant would objectively foresee that his statement might be used in the investigation or prosecution of a crime." (citation omitted)); *United States v. Cromer*, 389 F.3d 662, 675 (6th Cir.2004) (stating that the decisive inquiry in assessing Confrontation Clause questions is "whether a reasonable person in the declarant's position would anticipate his statement being used against the accused in investigating and prosecuting the crime"); *United States v. Saget*, 377 F.3d 223, 229 (2d Cir.2004) ("the [*Crawford*] Court would use the reasonable expectation of the declarant as the anchor of a more concrete definition of testimony"); *Commonwealth v. Gonsalves*, 833 N.E.2d 549, 558 (Mass. 2005) ("The proper inquiry is whether a reasonable person in the declarant's position would anticipate the statement's being used against the accused in investigating and prosecuting a crime.").

The difference is not merely linguistic or theoretical. Rather, it has enormous practical implications. The Indiana Supreme Court said that "responses to initial inquiries by officers arriving at a scene are typically not testimonial." In fact this assertion understates the effect of the court's decision. As we have contended, Petition at 19-22, the decision amounts to a virtually *per se* rule that an oral accusation made to an officer at the scene of a crime before any formal recording has been made is not testimonial.[4] Jurisdictions conscientiously applying a sounder test, by contrast, are far

[4] The discussion of the particulars of the case in our Petition is aimed principally at showing the breadth of the impact of the Indiana Supreme Court's decision, and the vulnerability to manipulation of the standard articulated by that court. Although the court purported to pay some attention to Amy's perspective, its discussion was very brief and entirely conclusory. If Amy's statement was not testimonial, we contend, then it is virtually always possible for a responding officer to take an oral accusatory statement at the scene (assuming the witness is willing to make one) without the statement being excluded by the Confrontation Clause.

more likely to recognize that accusatory statements to a police officer at the scene of an alleged crime are almost inevitably testimonial.

Thus, for example, in *Cromer*, *supra*, the United States Court of Appeals for the Sixth Circuit noted that a "statement made knowingly to the authorities that describes criminal activity is almost always testimonial." 389 F.3d at 675 (quotation and citation omitted). In *United States v. Arnold*, 410 F.3d 895 (6th Cir. 2005), the same court applied the *Cromer* standard to accusatory statements made by the complainant in a 911 call and to responding officers at the scene of the alleged crime – including an identifying statement made to the police when the accused arrived at the scene – and held that all of these were testimonial. (Neither *Cromer* nor *Arnold* is mentioned in the State's brief.) In *United States v. Hinton*, ___ F.3d ___, 2005 WL 2218919 (3d Cir. Sept. 14, 2005), issued since the State filed its Brief in Opposition in this case, the court also adopted the *Cromer* standard and applied it to a statement made by the complainant to police officers

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Our understanding of the breadth of the Indiana Supreme Court's decision is confirmed by the State's assertion that in this case "the police officer that elicited the statement did so before having evidence that a crime had been committed." BIO at 5. At first glance, this assertion is mystifying; as summarized in our Petition, at 22, before Amy made her oral accusatory statement, Officer Mooney had considerable evidence that a crime had been committed. What the officer did *not* have yet, of course, was an accusatory statement. Thus, the State's understanding appears to be that a responding officer can secure an accusation without its being considered testimonial; the key is to secure an oral accusation, for a written one, like the affidavit in this case, will likely be considered testimonial.

In one other respect, we are perplexed by the State's gloss on the decision of the Indiana Supreme Court. In an attempt to ensure that statements made unknowingly to undercover investigators shall not be deemed testimonial – a result with which we agree – the State indicates that under the decision of the Indiana Supreme Court it is a necessary (not merely sufficient) condition for a statement to be deemed testimonial that a reasonable person in the declarant's position would have anticipated use in legal proceedings. BIO at 7-8. We do not believe anything in the decision of the Indiana Supreme Court supports this reading.

in their squad car while cruising at the scene of the crime. The court held that the statement – identifying the accused as the assailant – was testimonial: the statement was spontaneous, made upon spotting the accused and apparently without any interrogation by the police.

Some state courts have reached similar conclusions. In *Gonsalves*, *supra*, decided since our petition was filed, the court, after adopting the *Cromer* standard, strongly indicated that an accusatory statement made by the complainant to responding officers was testimonial, even though the complainant remained sufficiently upset to satisfy the state's "spontaneous exclamations" exception to the rule against hearsay.[5] And the Georgia Supreme Court has repeatedly held that accusatory statements made to a police officer during a "field investigation" shortly after an alleged criminal incident are testimonial. *E.g.*, *Moody v. State*, 594 S.E.2d 350 & n.6 (Ga. 2004).

We do not believe it is necessary to explore further here the variations among jurisdictions' responses to the problem presented of statements to responding officers. *Cf. State v. Wright*, 701 N.W.2d 802, 812 (Minn. 2005) (reviewing decisions addressing

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[5] The State attempts to distinguish *Gonsalves* on the basis that in *Gonsalves* "the defendant had left the scene when police arrived and there was no ongoing threat to be assessed through questioning." BIO, at 5. Of course, we do not agree that the presense of the accused or of an ongoing threat prevents a statement from being considered testimonial. In some of the cases holding accusatory statements to responding officers to be testimonial, the accused remained, or had returned, to the scene. *See Arnold*, *supra*; *Hinton*, *supra*; Lopez v. State, 888 So.2d 693 (Fla. App. 2004); People v. Victors, 819 N.E.2d 311 (Ill. App.2004); Mason v. State, 2005 WL 1531286 (Tex. App. June 30, 2005). Moreover, given that an officer was already in the presence of the accused, we doubt that there was any more of an "ongoing threat" in this case than in those: that Officer Mooney's next step was to give Amy an affidavit form to fill out indicates that his conduct was not guided by the need to defuse an ongoing threat.

"the admissibility of statements made during field investigations").[9] That some jurisdictions take an approach that is radically different from that of Indiana is beyond genuine dispute.

## CONCLUSION

We believe the crucial considerations governing the question of whether to grant the petition in this case are all quite clear. There is a sharp conflict among jurisdictions concerning the standard determining whether an accusatory statement made to a responding police officer is testimonial for purposes of the Confrontation Clause. This conflict is one of great public importance and it will not be resolved without intervention by this Court. More than a year and a half having passed since *Crawford* and the matter having been addressed in many lower-court decisions, delay offers no substantial advantages but entails large costs. This case presents an ideal vehicle for this Court to address the matter.

---

[9] *Wright* noted that "there has been little consensus as to whether the statements are testimonial." It identified three groups of cases. First, some discerned a *per se* rule that such statements are not testimonial. Second, at the other end, *Arnold supra*, and *Moody supra*, "have deemed statements made during field investigations to be testimonial" as a categorical matter. Finally, a large group of decisions, including (in the *Wright* court's assessment) that of the Indiana Court of Appeals in this case, avoid a categorical rule and conclude that "certain statements produced during a field investigation may be nontestimonial." *Wright* joined this latter group and listed considerations that it believed should bear on the determination. 701 N.W.2d at 812.

For the foregoing reasons, the petition for a writ of certiorari should be granted.

RESPECTFULLY SUBMITTED this 20th day of September, 2005.

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No. 05-

IN THE
SUPREME COURT OF THE UNITED STATES

HERSHEL HAMMON,

Petitioner

v.

STATE OF INDIANA,

Respondent.

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I, Richard D. Friedman, do swear or declare that on this date, September 20, 2005, as required by Supreme Court Rule 29 I have served the enclosed PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid.

The names and addresses of those served are as follows:

Attorney General Steve Carter
c/o Deputy Attorney General Nicole M. Schuster
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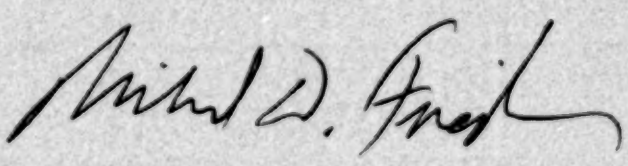
I declare under penalty of perjury that the foregoing is true and correct.

Executed on September 20, 2005



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September 20, 2005

Hon. William K. Suter, Clerk
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Washington, D.C. 20543

Re: *Hershel Hammon v. State of Indiana*, No. 05-5705

Dear Sir:

Enclosed for filing are the original and ten copies of Petitioner's Reply Brief in Support of Petition for a Writ of Certiorari in the above-captioned case, together with Proof of Service.

I believe all this is in order; if not, I would appreciate your letting me know.

Thank you for your kind consideration.

Sincerely,

Richard D. Friedman

Enclosures

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No. 05-5705

IN THE

# Supreme Court of the United States

HERSHEL HAMMON,

*Petitioner*,

v.

STATE OF INDIANA,

*Respondent.*

**On Petition for Writ of Certiorari to the Indiana Supreme Court**

## BRIEF OF *AMICI CURIAE* THE PUBLIC DEFENDER SERVICE FOR THE DISTRICT OF COLUMBIA AND THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS


| | Page |
|---|---|
| INTEREST OF *AMICI CURIAE* | 1 |
| STATEMENT OF THE CASE | 3 |
| REASONS FOR GRANTING THE PETITION | 3 |
| 1. The Indiana Supreme Court treated as unremarkable for confrontation purposes the fact that the entirety of the prosecution's case consisted of a criminal accusation made by an absentee witness to an "investigating" police officer | 5 |
| 2. The Indiana Supreme Court's definition of "testimonial" focused on its speculation as to what motivated the absent witness to speak rather than looking to whether an objective witness would have reasonably anticipated the use of the statement in a criminal proceeding | 6 |
| 3. The Indiana Supreme Court decision appeared to limit *Crawford's* protections to "formal" witness statements such as affidavits | 8 |
| 4. The Indiana Supreme Court, in determining whether a statement is testimonial, deemed the motive of police the "most important" factor in its analysis | 9 |
| CONCLUSION | 11 |

# TABLE OF AUTHORITIES


CASES — Page

*Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998) ..... 3

*Commonwealth v. Gonsalves*, ___N.E.2d___, 2005 WL 2046000 (Mass. Aug. 29, 2005) ..... 3, 11

*Crawford v. Washington*, 541 U.S. 36 (2004) ....2, 6, 7, 9, 10, 11

*Ewing v. California*, 535 U.S. 969 (2002) ..... 2

*Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) ..... 3

*Hammon v. State*, 829 N.E.2d 444 (Ind. 2005) ...5, 6, 7, 9

*Lockyer v. Andrade*, 535 U.S. 969 (2002) ..... 2

*McCreary County, Ky. v. ACLU*, 125 S. Ct. 310 (2004) ..... 2

*Murphy v. United Parcel Service, Inc.*, 527 U.S. 516 (1999) ..... 3

*State v. Parks*, 116 P.3d 631 (Ariz. App. 2005) .... 4

*State v. Wright*, ___N.W.2d___, 2005 WL 1903860 (Minn. Aug.11, 2005) ..... 4

*Sutton v. United Air Lines*, 527 U.S. 471 (1999)... 3

*Van Orden v. Perry*, 125 S. Ct. 346 (2004) ..... 2

CONSTITUTIONAL PROVISIONS

U.S. Const. amend VI ..... 6

IN THE

# Supreme Court of the United States

No. 05-5705

HERSHEL HAMMON,

*Petitioner*,

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STATE OF INDIANA,

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**On Petition for Writ of Certiorari to the Indiana Supreme Court**

## BRIEF OF *AMICI CURIAE* THE PUBLIC DEFENDER SERVICE FOR THE DISTRICT OF COLUMBIA AND THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER

## INTEREST OF *AMICI CURIAE*

Public Defender Service for the District of Columbia represents indigent criminal defendants. *Amicus curiae* National Association of Criminal Defense Lawyers is a non-profit corporation with a membership of more than 10,000 attorneys nationwide, along with 78 affiliate organizations numbering 28,000 members in 50 states.[1]

[1] Accompanying this brief are letters of consent to its filing. No counsel for any party authored any part of this brief, and no person or entity, other than *amici*, has made a monetary contribution to the preparation or submission of this brief.

*Amici* have already filed a brief in support of Petitioner in *Davis v. Washington*, Docket No. 05-5224, in which we discussed the urgency of resolving the significant interim uncertainty that remains about what constitutes a "testimonial" statement necessitating confrontation under *Crawford v. Washington*, 541 U.S. 36 (2004). As *amici* demonstrated, that confusion is particularly acute in cases where the prosecution relies on "excited" criminal accusations made by an absentee witness in response to questioning by a 911 operator or a responding police officer. *Amici* support the grant of writs of certiorari in *Davis* and *Hammon* to address the legal confusion surrounding the admission of unconfronted accusatory statements to 911 operators and responding officers respectively.

Having set forth in *Davis* what we see to be the primary source of legal confusion and division in the lower courts when examining "excited" accusatory statements to government agents—the failure to use the common-law right to confrontation as the touchstone to determine which statements are "testimonial"—we explain in this brief why Mr. Hammon's case would serve as an excellent vehicle to address how *Crawford* affects the admission of unconfronted accusatory statements made to responding police officers, just as *Davis* would serve as an excellent vehicle to address *Crawford's* application to accusatory statements to 911 operators. *Amici* again encourage this Court to grant certiorari in both *Hammon* and *Davis*, as it has done in other related cases addressing a complex issue with widespread impact,[2] in order to put an end to the substantial uncertainty that currently plagues this important area of the law.

---

[2] *See, e.g., Van Orden v. Perry*, 125 S. Ct. 346 (2004), and *McCreary County, Ky. v. ACLU*, 125 S. Ct. 310 (2004) (whether ten commandments displays violate the Establishment Clause); *Ewing v. California*, 535 U.S. 969 (2002), and *Lockyer v. Andrade*, 535 U.S. 969 (2002) (whether applications of California's Three Strikes Law violated the Cruel and Unusual

## STATEMENT OF THE CASE

Hershel Hammon's conviction for domestic battery rests entirely on the testimony of Peru, Indiana police officer Jason Mooney, who concededly witnessed none of the pertinent events that precipitated the charges and obtained all of the information he recited at trial through questioning Mr. Hammon's accuser (Amy Hammon) during his investigation of the incident. *Amici* adopt Petitioner's statement of the case, *see* Petition for Writ of Certiorari (Pet.) at 1-7.

## REASONS FOR GRANTING THE PETITION

*Amici* have already discussed in detail in our brief in support of Adrien Davis' Petition for a Writ of Certiorari, Docket No. 05-5224 (hereinafter "*Davis Amici*'s Brief") why this Court must act promptly to resolve the fundamental disagreement about the meaning and scope of the confrontation guarantee that has arisen in the wake of this Court's decision in *Crawford v. Washington*. We will not duplicate that discussion here, except to note that there is a striking division among appellate courts regarding the "testimonial" nature of "excited utterances" made to 911 operators and responding police officers, as described in Mr. Hammon's Petition and in the briefs submitted by Mr. Davis and *amici* in *Davis v. Washington*, Docket No. 05-5224. *Amici* also note once again that this division has matured and solidified. Indeed, new decisions emerge daily that confirm and entrench these divisions. *See, e.g.*, *Commonwealth v. Gonsalves*, ___ N.E.2d ___, 2005 WL 2046000, at *6, 8-9 (Mass. Aug. 29, 2005) (rejecting the Indiana Supreme Court's analysis in *Hammon*, looking to

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Punishment Clause); *Sutton v. United Air Lines*, 527 U.S. 471 (1999), and *Murphy v. United Parcel Service, Inc.*, 527 U.S. 516 (1999) (whether "correctable" disabilities are covered by Americans with Disabilities Act); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) (whether employers are vicariously liable for sexual harassment under Title VII).

*Crawford* and "the historical purpose of the confrontation clause," and holding that "*all* statements the declarant knew or should have known might be used to investigate or prosecute the accused" including statements taken by responding officers engaged in "preliminary fact gathering" and "spontaneous utterances" are testimonial); *State v. Parks*, 116 P.3d 631 (Ariz. App. 2005) (looking to the "historic underpinnings" of the Confrontation Clause and holding that "excited utterances" to a responding police officer were testimonial); *State v. Wright*, ___ N.W.2d ___, 2005 WL 1903860 (Minn. Aug. 11, 2005) (holding that "excited utterances" to 911 operator and responding police officer were nontestimonial based on an ahistorical analysis of, *inter alia*, emotional state of the declarant and motives of the questioner).

Hershel Hammon's case is an excellent vehicle for resolving the basic disagreement surrounding the "testimonial" nature of accusations made to responding police officers, where those accusations are nonetheless admitted in the absence of confrontation under state hearsay law as "excited utterances." In part, as Petitioner notes, Mr. Hammon's case is an appropriate one because there are no procedural impediments to this Court's review of the merits: The confrontation issue was raised by defense counsel in the trial court and on appeal, was the subject of two detailed appellate decisions in the Indiana courts, and the issue is dispositive to the outcome of Mr. Hammon's case. *See* Pet. at 4, 24; Tr. 5-9-03 at 6-9, 11, 13-15, 24, 30-32.

But Mr. Hammon's case is also a worthy candidate for review because the Indiana Supreme Court's opinion mirrors the reasoning of a number of appellate decisions around the country—reasoning other courts have rejected and that *amici* believe to be irreconcilably in conflict with this Court's *Crawford* decision and with the common law confrontation right embodied in the Confrontation Clause. *See Davis Amici's* Brief at 5-8 (explaining that *Crawford* reconnected

the constitutional right to confrontation to its common-law roots). In particular, the Indiana Supreme Court's opinion in Mr. Hammon's case shares at least four attributes with lower court decisions from around the country that interpret *Crawford* and the constitutional confrontation guarantee both too narrowly and without reference to the common law. Granting Mr. Hammon's petition will accordingly allow this Court to provide critical guidance on all of these important topics:

1. **The Indiana Supreme Court treated as unremarkable for confrontation purposes the fact that the entirety of the prosecution's case consisted of a criminal accusation made by an absentee witness to an "investigating" police officer.**

Like *Davis v. Washington*, Mr. Hammon's case is representative of a group of post-*Crawford* appellate decisions that treat as unremarkable the absence at trial of any percipient witness to the alleged crime. In fact, the Indiana Supreme Court acknowledged that this case "presents an all too familiar scenario: the police respond to a report of domestic violence, an apparent victim reports a battery, and the victim then does not testify at trial . . . ." App. A (*Hammon v. State*, 829 N.E.2d 444, 448 (Ind. 2005)). And yet, the Indiana Supreme Court determined that this "report" to police—which consisted entirely of a criminal accusation made to an "investigating" police officer[3]—was not "testimonial" under *Crawford*, even though it was a product of Amy Hammon's third interview with police (the interview at the door being the first and the interview with Officer Richard being

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[3] After speaking to Amy Hammon at her door, Officer Mooney entered the house and interviewed Ms. Hammon again because he felt it was his duty "to investigate further," even though Ms. Hammon initially told him that "everything was okay." App. C (Tr. 5-9-03 at 8, 18); *see also* App. C (Tr. 5-9-03 at 24) (police "separate[d]" Mr. and Ms. Hammon in order "to investigate"); App. D (Officer Mooney signed Battery Affidavit as the "investigating officer").

the second[4]), and even though Ms. Hammon, the "victim/witness," immediately followed this "report" by completing a "battery affidavit" formally accusing Mr. Hammon of a crime under penalty of perjury.[5] It is no stretch to say that the admission at an American criminal trial of such unconfronted testimony, procured as it was through close interaction with police from a person explicitly labeled by the police as a "witness," would have "astounded" the Framers. *See Crawford*, 541 U.S. at 66. Nonetheless, the Indiana Supreme Court did not even note in passing that such a prosecution would have been exceptional (and squarely forbidden) at common law, *see Davis Amici's* Brief at 17-20, nor did it attempt to square its decision with the plain language of the confrontation guarantee, which requires confrontation of all "witnesses against" the "accused" in every "criminal trial." U.S. Const. amend VI.

**2. The Indiana Supreme Court's definition of "testimonial" focused on its speculation as to what motivated the absent witness to speak rather than looking to whether an objective witness would have reasonably anticipated the use of her statement in a criminal proceeding.**

Mr. Hammon's case is also typical in that the Indiana Supreme Court's "testimonial" analysis improperly focused on what motivated the absent witness to speak to police. Like the Washington Supreme Court in *Davis* and many other courts around the country, the Indiana Supreme Court looked to whether absentee witness Amy Hammon made her accusatory statements to the responding police officers with the subjective "intent that . . . her statement[s] w[ould] be used against the defendant at trial." App. A (829 N.E.2d at 457).

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[4] App. A (829 N.E.2d at 446-47); App. C (Tr. 5-9-03 at 8); Record on Appeal ("R.A.") at 39 (Probable Cause Affidavit).

[5] Officer Mooney asked Ms. Hammon to fill out the affidavits as "a normal part . . . of [his] investigation." App. C (Tr. 5-9-03 at 12).

The court below concluded that Amy Hammon's statements were not "testimonial" because they were excited utterances, *id.* at 453, 458, and because her "motivation was to provide basic facts, and there is no suggestion that Amy wanted her initial responses"—as opposed to the statements she made moments later in a signed and sworn affidavit—"to be preserved or otherwise used against her husband at trial." *Id.* at 458.

As *amici* have previously explained, *see Davis Amici*'s Brief at 8-13, this focus on the motivation of the absent witness has no foundation in the common law and, by confusing the "testimonial" inquiry with the test for determining whether a statement is an "excited utterance" under state hearsay law, it also runs afoul of this Court's efforts in *Crawford* to disentangle the confrontation guarantee from hearsay rules. By contrast, an objective analysis of a witness's *anticipation* of the consequences of her statement focuses, as it did under the common law, on whether the statement is an accusation of a completed crime, whether it was made to a known government agent and whether, given these factors, a reasonable person would know the statement is one that might be used in a criminal proceeding.

In addition to being historically accurate, reliance on objective factors about what a witness would have reasonably anticipated makes it easy to determine when confrontation will be required because it does not require courts to speculate about the many idiosyncratic and possibly unknowable forces that might have "motivated" an absent witness to speak to police. Such an objective test would have precluded the Indiana Supreme Court from engaging in the inherently complicated and uncertain task of guessing what Ms. Hammon and Officer Mooney desired as a result of their conversation, *see Crawford*, 541 U.S. at 66 ("[o]nly cross-examination could reveal" "Sylvia [Crawford]'s perception of her situation"); *see also id.* (condemning the assumptions made under

the *Ohio v. Roberts* analysis that "cross-examination might well have undermined"). Instead this test would have forced the lower court to address a much simpler and more pertinent question—why a criminal accusation to police, made by a witness who signed a sworn statement explicitly acknowledging that her accusations would be used to commence legal proceedings, should not be deemed a "testimonial" statement under *Crawford*.

**3. The Indiana Supreme Court decision appeared to limit *Crawford*'s protections to "formal" witness statements such as affidavits.**

The Indiana Supreme Court drew a distinction of constitutional magnitude between Ms. Hammon's "battery affidavit," *see* App. D—which the court found to be "testimonial"—and the identical verbal accusations Ms. Hammon made to Officer Mooney only moments before during the same conversation, *see* App. C (Tr. 5-9-03 at 11-12). Such a distinction is far from unique, but is instead representative of the many decisions around the country that look to whether an out-of-court witness state-ment sufficiently mirrors the specific abusive mechanisms of Tudor, Stuart or Hanoverian England that were of immediate concern to the Framers. *See Davis Amici*'s Brief at 13 & n.9. But as *amici* have demonstrated, it turns history on its head to allow the sixteenth and seventeenth century mechanisms used to evade the common-law confrontation right to define the whole of that right as it is preserved in the Confrontation Clause. *Id.* at 13-15. After all, the civil law "abuses" were not offensive to the Framers simply because the facially accusatory statements obtained and used at trial by the government in infamous trials like Sir Walter Raleigh's were formally made and documented—rather, the Framers' primary concern with the use of *ex parte* affidavits and the like is that their formality was used as a justification to encroach upon the otherwise broad common-law right that entitled an accused to confront his accuser in open court. Thus, although the Framers were obviously

concerned with the more formal abusive mechanisms with which they were most familiar, there is every reason to believe that the informality of criminal accusations made to police soon after an incident would have *heightened*, not lessened, concerns about the use of such statements in criminal prosecutions. *See Davis Amici*'s Brief at 14-15.

**4. The Indiana Supreme Court, in determining whether a statement is "testimonial," deemed the motive of police the "most important" factor in its analysis.**

A final noteworthy feature of the Indiana Supreme Court's decision is its focus on the "motive of the questioner" in determining whether a statement is "testimonial" under *Crawford*. The court, in fact, deemed this factor to be the "most important" in its testimonial analysis. Again the lower court's analysis is representative. As the Indiana Supreme Court itself observed, many appellate courts seek to separate for confrontation purposes those statements obtained by police during their "preliminary investigation" from those obtained after a formal investigation has begun. App. A (829 N.E.2d at 454-56).

But the emphasis on the motivation of police in eliciting the statement finds no support in the common law, and neither the Indiana Supreme Court nor any of the lower courts that espouse this rationale claims a historical precedent for such an analysis. Instead, this analysis, and particularly its focus on the supposedly non-adversarial nature of police questioning during the preliminary investigation, are reminiscent of the discredited trial court ruling in *Crawford* itself. There, the trial court had found that confrontation of Sylvia Crawford's statement was not required because the law enforcement officer who questioned her was "neutral to her and not someone who would be inclined to advance her interests and shade her version of the truth unfavorably toward the defendant." *Crawford*, 541 U.S. at 66.

This Court emphatically rejected the trial court's reasoning, observing that the "Framers would be astounded to learn that *ex parte* testimony could be admitted against a criminal defendant because it was elicited by 'neutral' government officers." *Crawford*, 541 U.S. at 66. In short, as *Crawford* makes clear, the Confrontation Clause, now reconnected to its common-law origins, will not allow for an assumption that governmental agents have obtained criminal accusations in a "neutral" fashion—the Framers understood that there are no "neutral" government officials, but rather only investigative arms of the state who always act in an adversarial manner for confrontation purposes.

This is not to say that there is anything wrong with conducting investigations in an adversarial fashion or that police somehow act improperly when they obtain "testimonial" statements during the course of their investigations—a fact that the lower court, like many others, appeared to misunderstand when it limited testimonial statements to those elicited by the police in an effort to "pin down and preserve" information. App. A (829 N.E.2d 44). The confrontation guarantee was not intended to be some sort of addendum to due process protections against coercive questioning or *Miranda* warnings. It was not designed to discourage or encourage any particular police investigative procedure, and it was certainly not meant to steer police (as the Indiana Supreme Court's interpretation of "testimonial" would) toward cursory, hasty interviews of still-agitated witnesses, by shielding the participants in such *ex parte* examinations from confrontation. Rather, as *Crawford*, the text of the Sixth Amendment, and its common-law history make clear, the Confrontation Clause sets forth a trial right, the object of which is to ensure that, where the prosecution attempts to use any statements gained through one-sided police examinations as substantive evidence of guilt, those statements are subjected to the crucible of adversarial testing in the form of cross-examination. That lesson was lost on the Indiana Supreme Court in this case.

## CONCLUSION

Granting the petition in both Mr. Hammon's case and in Mr. Davis's case will allow this Court to provide much-needed guidance about the purpose and scope of the Confrontation Clause, now that the Court has reconnected that guarantee with its common-law origins in *Crawford v. Washington*. Chief Justice Rehnquist rightly noted in his concurrence in *Crawford* that "thousands of federal prosecutors and tens of thousands of state prosecutors need answers as to what" is "testimonial," beyond that which was specifically designated as such in this Court's majority opinion. 541 U.S. at 75. The defense bar no less than federal and state prosecutors needs clarification of this important point of law, which arises daily in courts across the country in all sorts of criminal cases where percipient witnesses who have made post-crime statements that the prosecution seeks to use at trial fail to appear for any number of reasons. In short, "this is not an academic debate, but an issue of tremendous pragmatic consequence to the trial of criminal cases." *Gonsalves*, 2005 WL 2046000, at *23 (Sosman, J., concurring in part). To delay review of this important issue by denying a writ of certiorari in this case will perpetuate confusion in innumerable criminal cases throughout the nation.

Respectfully submitted,

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No. 05-5705

Supreme Court, U.S.
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DEC 23 2005
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# In The Supreme Court of the United States

HERSHEL HAMMON,

*Petitioner,*

v.

STATE OF INDIANA,

*Respondent.*

**On Writ Of Certiorari To The Indiana Supreme Court**

## JOINT APPENDIX

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# TABLE OF CONTENTS

Page

Relevant Docket Entries ..... 1

Battery Affidavit of Amy Hammon ..... 2

Transcript of the Evidence in the Miami Circuit Court of Indiana ..... 4

Presentence Investigation Report (without Attachments) and Addendum ..... 52

Decision of the Court of Appeals of Indiana ..... 66

Decision of the Indiana Supreme Court ..... 80

Order of Supreme Court of the United States Granting In Forma Pauperis Status and Certiorari ..... 108

## RELEVANT DOCKET ENTRIES FROM THE COURTS BELOW

| | | |
|---|---|---|
| 03/04/2003 | Miami Circuit Court of Indiana | Information Filed Against Petitioner for Domestic Battery |
| 05/09/2003 | Miami Circuit Court of Indiana | Petitioner's Trial |
| 05/09/2003 | Miami Circuit Court of Indiana | Petitioner Found Guilty of Domestic Battery |
| 05/29/2003 | Miami Circuit Court of Indiana | Presentence Investigation Report Filed |
| 06/06/2003 | Miami Circuit Court of Indiana | Petitioner Sentenced to One Year in Miami County Jail, All but Twenty Days Suspended |
| 06/20/2003 | Court of Appeals of Indiana | Notice of Appeal Filed by Petitioner |
| 06/14/2004 | Court of Appeals of Indiana | Opinion Issued, Petitioner's Conviction and Sentence Affirmed |
| 09/08/2004 | Indiana Supreme Court | Petition to Transfer Jurisdiction to the Indiana Supreme Court Filed by Petitioner |
| 12/09/2004 | Indiana Supreme Court | Oral Argument Heard on Petition to Transfer |
| 12/09/2004 | Indiana Supreme Court | Petition to Transfer Granted |
| 06/16/2005 | Indiana Supreme Court | Opinion Issued, Petitioner's Conviction and Sentence Affirmed |

STATE OF INDIANA, SS: IN MIAMI CIRCUIT COURT
GENERAL TERM

COUNTY OF MIAMI,

STATE OF INDIANA
VS CAUSE NO. 52C01-0302-CM-57
HERSHEL HAMMON

STATE OF INDIANA )
) SS: Hammon, Hershel R.
COUNTY OF MIAMI )

BATTERY AFFIDAVIT

On or about the 26*day of Feb., ~~19~~2003, in Miami County, State of Indiana, Hershel Hammon (Defendant's Name) did knowingly touch Amy Hammon (Victim's Name) in a rude, insolent and angry manner, to-wit: Broke our Furnace & shoved me down on the floor into the broken glass. Hit me in the chest and threw me down. Broke our lamps & phone. Tore up my van where I couldn't leave the house. Attacked my daughter. (Describe the Acts)

Which touching resulted in the bodily injury to Amy L. Hammon (Victim's Name)

I understand that the investigating officer is relying upon my allegations set forth in the affidavit as establishing

* [Original Form filled in by hand.]

Probable Cause for the arrest of the defendant on the charge of Battery under IC 35-42-2-1.

/s/ Amy L. Hammon
Victim/Witness

/s/ J. Mooney
Investigating Officer

AFFIRMATION

I affirm under the penalties for perjury that the foregoing representations are true. I further understand the provisions of the false informing statute and declare I am reporting a crime.

/s/ Amy L. Hammon
Victim/Witness

Time 11:30 pm

Date 2/28/03

Location 590 E. 5th

STATE OF INDIANA,

SS: IN THE MIAMI CIRCUIT COURT

COUNTY OF MIAMI, GENERAL TERM

STATE OF INDIANA

VS CAUSE NO. 52C01-0302-CM-57

HERSHEL HAMMON

TRANSCRIPT OF THE EVIDENCE

BRENT DAVIS

DEPUTY PROSECUTOR

COURT HOUSE

PERU IN 46970

REPRESENTING THE STATE

APPEARANCES:

ROBERT A. SPAHR

MIAMI COUNTY PUBLIC DEFENDER

55 SOUTH BROADWAY

PERU IN 46970

REPRESENTING THE DEFENDANT

TRANSCRIPT VOLUME ONE OF ONE

CONTAINING PAGE 1 THROUGH PAGE 41

[1] **05-09-03** BY THE COURT: Mr. Hammon. And there are two Cause Numbers, is that correct?

BY MR. DAVIS: That is correct.

BY THE COURT: Is one of them a probation violation?

BY MR. SPAHR: That's correct.

BY THE COURT: State of Indiana versus Hershel Hammon. Two Cause Numbers 52C01-0209-CM-356 and 52C01-0302-CM-57. Mr. Hammon appears in person along with his attorney, Robert Spahr, and Mr. Davis is here for the State of Indiana and this matter is on the Court's calendar for . . . I assume it is trial on the February 2003 case and if he is found guilty of that offense then that is the basis, underlying basis for probation violation.

BY MR. SPAHR: That is how it's laid out.

BY THE COURT: Okay.

BY MR. DAVIS: Actually Judge the State is proceeding to trial on the probation violation today.

BY THE COURT: And what are we doing with this, the more recent case?

BY MR. DAVIS: We may be dismissing it.

BY THE COURT: Okay.

BY MR. SPAHR: The Court please. I believe that . . .

BY THE COURT: So it's a Fact-Finding hearing?

BY MR. SPAHR: No.

BY THE COURT: A Probation Violation would be a Fact-Finding hearing.

BY MR. SPAHR: Well yes it is Judge, however, the whole basis for the probation violation is the commission of a Domestic Battery, that is the CM-57.

[2] BY THE COURT: Okay.

BY MR. SPAHR: We need to go to trial on CM-57 in order for, at least this is our view, before there's even an issue of a violation of probation. So were asking the Court to proceed on the CM-57 and call their first witness.

BY MR. DAVIS: Judge I believe that we can proceed under the probation violation showing the factual basis that the battery occurred.

BY MR. SPAHR: We disagree with that observation. It calls for a judicial conclusion that a crime occurred on the Domestic Battery this year and that . . . , it isn't just a factual basis, it is in effect the commission, it's alleged, commission of Domestic Battery.

BY THE COURT: I think this is a fascinating question and I don't know the answer right now. And I think that it's pretty significant because if you are going to a fact-finding hearing your burden is only by a preponderance and if you do a trial it's beyond a reasonable doubt.

BY MR. SPAHR: Correct.

BY THE COURT: I'm thinking I need to go read some law.

BY MR. SPAHR: Thank you Judge.

**BREAK.**

BY THE COURT: I think this is what we need to do. You have the burden of proof and since this matter was

set for trial on the Domestic Battery, is it a Domestic Battery or just a Battery?

BY MR. DAVIS: It's a Domestic Battery.

BY MR. SPAHR: Domestic Battery.

BY THE COURT: Your burden of proof there is beyond a reasonable doubt. [3] You could proceed, you can proceed on both of them. I imagine the factual basis is the same for each of them. It might be that you prove the probation violation without getting to the beyond a reasonable doubt. I think you have to go to trial today because it's been set on the Court's calendar and the Defendant is anticipating a trial today. So it may be that the finding at the end of it all will be that you have demonstrated by a preponderance that he did commit domestic battery by, you haven't taken it to beyond a reasonable doubt.

BY MR. SPAHR: I would indicate to the Court also that it's my understanding that the victim is not here and had been subpoenaed to appear I believe.

BY MR. DAVIS: That's correct.

BY MR. DAVIS: That would go to our standard of proof I think. If I'm understanding the Court correctly we're going to proceed, may proceed simultaneously on . . .

BY THE COURT: On both counts.

BY MR. DAVIS: . . . on both causes.

BY THE COURT: On both causes, uh-huh.

BY MR. DAVIS: And the Court may be in a position to find on one and not the other.

BY THE COURT: Sort of the . . . it's the O.J. Simpson.

BY MR. DAVIS: Okay. We'll proceed on that basis.

BY THE COURT: Okay. Any opening statements?

BY MR. DAVIS: Judge, the Defendant is charged with Domestic Battery which occurred on February 26th, 2003 which we allege that uh . . . he did knowingly and intentionally touch Amy L. Hammon, who is or was the spouse of the Defendant [4] and all that activity occurred in this venue and contrary to the statute of 35-42-2-1.3.

BY MR. SPAHR: We have no response.

BY THE COURT: Call your witnesses.

BY MR. DAVIS: Yes please Your Honor, call Jason Mooney.

BY THE COURT: Officer Mooney. Would you swear that the testimony that you are to present to the Court will be the truth, the whole truth, and nothing but the truth, so help you God?

BY OFFICER MOONEY: Yes [inaudible] Your Honor.

BY THE COURT: Have a seat please.

BY MR. SPAHR: Ask the Court to uh . . . for a separation of witnesses. If there is any witnesses other than this gentleman, I would like them out of the Courtroom.

BY THE COURT: Are there any other witnesses Mr. Davis?

BY MR. DAVIS: Yes Your Honor, I plan to call Gail Raber from the probation department.

BY THE COURT: Ms. Raber, would you leave the Courtroom please?

**DIRECT EXAMINATION**

**BY**

**BRENT DAVIS:**

Q Officer Mooney, state your name for the record please?

A Jason Mooney.

Q And you're employed by the Peru Police Department?

A Yes I am.

Q And how long have you been employed by them?

A Approximately three years, since October of 2000.

[5] Q And what are your primary duties with the Police Department?

A I'm a second shift patrol officer.

Q Recalling your attention to February 26th of 2003, were you on duty for the police department on that day?

A Yes I was.

Q And do you recall being dispatched to the location of 590 East Fifth Street in Peru, Indiana?

A Yes I was dispatched to a Domestic Disturbance at that address.

BY MR. SPAHR: I'm sorry, he's speaking too fast I can't hear him.

A I was dispatched to a domestic disturbance at that address.

BY MR. SPAHR: I object to the characterizations to why he was being dispatched to, ask that it be stricken from the record and ask that he . . . his anser [sic] beyond the form of the question as a volunteered statement.

BY THE COURT: Probably the easiest thing Officer Mooney is directly answer the . . . the questions that Mr. Davis presents to you.

Q What was the nature of the complaint that you were dispatched to that location?

BY MR. SPAHR: Objection. Cause is leading.

BY THE COURT: I would overrule that objection.

BY MR. SPAHR: I'll object because it is . . . it is . . . it is a hearsay statement.

BY THE COURT: I overrule that. It is not a hearsay statement. It is intending to show why he is going to do what he is going to do and it doesn't necessarily suggest the truth. So your objection is overruled.

A My initial dispatch I believe was to attend 10-16 which is a fight, domestic [6] disturbance.

Q And when you arrived at that location, whom did you encounter?

A Amy Hammon.

Q Okay. And what was your conversation with her?

BY MR SPAHR: Objection, hearsay.

BY MR. DAVIS: Your Honor, in Trial Rule 101, the probation violation matters pertaining to probation believe the trial rules do not apply and reliable hearsay would be acceptable.

BY MR. SPAHR: If the Court please. The victim, alleged victim is not here, he's not an eye witness. It is, if it's being offered to prove the elements of the offense and he's not an eye witness, it's hearsay. Our belief is that and we're asking the Court not to permit him to do the hearsay bit even if it . . . even if it could come in as a probation violation, we're doing double duty here.

BY THE COURT: That's correct.

BY MR. SPAHR: And we're asking the Court if yo:'re going to do that then you wear two hats here when you're evaluating the truth of these statements.

BY THE COURT: I understand that.

BY MR. DAVIS: I believe the Court can evaluate the weight of that evidence to the two different standards we're proceeding under here. Is there an objection?

BY MR SPAHR: There's an objection. The standing objection is to any statements that are attributed to Amy L. Hammon. Number one, there's no indication that Amy L. Hammon was the person he was talking to.

BY MR. DAVIS: I believe he can identify the person that he talked to.

BY MR. SPAHR: Well, that's not part of the evidence yet.

[7] BY MR. DAVIS: Judge, I believe if we're going to proceed under Cause 356 and 57, it may not be . . ., it may be hearsay under 57 but I believe it's admissible under 356, which is the probation violation.

BY THE COURT: I think it's admissible under both. Go ahead. And I think it's an excited utterance exception.

BY MR. DAVIS: Yes.

Q Who did you encounter initially in that location?

A Amy Hammon.

Q Okay. Now what did you . . . what were your observations of Ms. Hammon?

A At first I asked her . . .

BY MR. SPAHR: Objection as to any statement she made.

BY THE COURT: He asked you for your observations.

A My observation at first is that she seemed somewhat frightened speaking to me.

Q Okay. What was your . . . did you make any observation of the premises at that time?

A I was on the front porch and I had not entered the premises at that time.

Q Okay. Okay, tell us what Ms. Hammon said to you.

BY MR. SPAHR: Again, objection as hearsay. It is not an excited utterance. In my opinion it is not an excited utterance unless there's facts presented that would substantiate that this officer had some clue as to the duration between one avant [sic] and when the statement is made.

BY THE COURT: Establish your basis.

Q You testified that you were dispatched on the complaint of a domestic [8] disturbance.

A Yes.

Q And you testified that Ms. Hammon was the first person you encountered there.

A Yes.

Q What did you believe . . . what . . . what was her state of mind at that time or what was her behavior?

A Timid, she seemed frightened.

Q Did her behavior give you cause to believe that she had information regarding the reason why you were dispatched to the location?

A Yes.

BY MR. SPAHR: Objection. Calls for conclusion.

BY THE COURT: Overruled. We're going to proceed Mr. Spahr. I want to hear the story and your objection is overruled. I will show it as a continuing objection.

BY MR. SPAHR: Thank you Judge.

Q Now please tell us what Ms. Hammon said to you.

A My first question to her was if there was a problem there and if anything was going on. She stated "No." That everything was okay at that time. Due to her fact of being timid and somewhat frightened . . .

BY MR. SPAHR: Objection, he's going beyond the scope of the question. Involuntary statement.

BY THE COURT: Go ahead Mr. Davis.

Q Do you recall exactly what she said to you?

[9] A She stated nothing was the matter, that everything was okay.

Q Okay, and then what did you do after that?

A I asked her if it was okay if I could come in the residence and check things out to make sure for myself that everything was okay.

Q Did she give you consent to do that?

A Yes she did.

BY MR. SPAHR: Objection. Again, presumably . . .

BY THE COURT: I am showing it as a continuing objection Mr. Spahr.

BY MR. SPAHR: My point Judge, it's . . . it's not only hearsay but it's also . . . it's tried to bootstrap a consent that is . . . I think there is another way of getting it in perhaps.

BY THE COURT: Go ahead.

Q Based upon the response to your question what did you do next?

A In response to my initial question if everything was okay?

Q Yes.

A I continued to investigate and asked her if it was okay if I could come into the residence.

Q Did you in fact enter the premises?

A Yes.

Q Give us your observation of the premises.

A My first observation was, I walked through the entryway I believe into the living room and I noticed the living room to be in a little bit disarray. I noticed there was a . . .

BY MR. SPAHR: Objection

[10] BY MR. DAVIS: This is a first hand eye witness account of what he saw.

BY MR. SPAHR: The statement suggests that he's been in the home before in order to make a comparison. Object to this as being characterized as out of order and I'd ask the Court to establish . . . have counsel establish whether or not this gentleman had ever been in the apartment or house before.

Q In the course of your employment with the Peru Police Department have you had an occasion to investigate a number of domestic disturbances?

A Yes.

Q And in the course of that investigation, you've entered a number of premises?

A Yes.

Q In your opinion, was there something that you observed in the premises to indicate why you were dispatched to that location?

A Yes.

Q Okay. What was that?

A There was a, I believe a gas heating unit in the corner of the living room which I noticed first there was flames coming out of the front of the unit, had a glass front, partial glass front. There was pieces of glass on the ground in front of it and there was flame emitting from the front of the heating unit. Appeared as if it had been broken, I'm assuming recently.

BY MR. SPAHR: Objection, assumptions, conclusions.

Q Did uh . . ., you encounter the Defendant, Mr. Hammon, in the premises?

A Yes I did.

Q What did you say to him, what did he say to you?

[11] A I again asked Mr. Hammon if everything was okay at that residence. If he and his wife had been in an argument. He stated "Yes" but that everything was fine now and it never became physical.

Q Where did you proceed after that?

A I proceeded to enter the living room where Amy was located to speak with her.

Q And what did she tell you at that time?

BY MR. SPAHR: Objection, hearsay.

BY THE COURT: I'll show it as a continuing objection.

A She informed me that she and Hershel had been in an argument. That he became irrate [sic] over the fact of their daughter going to a boyfriend's house. The argument became verbal, excuse me, the argument became physical after being verbal and she informed me that Mr. Hammon, during the verbal part of the argument was breaking things in the living room and I believe she stated he broke the phone, broke the lamp, broke the front of the heater. When it became physical he threw her down into the glass of the heater . . .

BY MR. SPAHR: Objection as to the physical aspects of this matter, it's all hearsay.

Q Are you reporting what she told you?

A Yes.

Q Did she tell you that . . .

BY MR. SPAHR: Objection, leading.

BY MR. DAVIS: Same objection?

BY THE COURT: No, a leading objection is different from hearsay objection.

[12] BY MR. DAVIS: Oh it's a leading objection, I thought . . . okay.

Q What did . . . what did she tell you in regards to the physicality of the altercation?

A She informed me Mr. Hammon had pushed her onto the ground, had shoved her head into the broken glass of the heater and that he had punched her in the chest twice I believe.

Q What happened next with respect to your activities?

A During that activity I was aware that Mr. Hammon would walk into the living room to, in my opinion . . .

BY MR. SPAHR: Objection as to his opinion. What he observed will . . . that was the question.

Q After your conversation with Mrs. Hammon, where did you direct your attention next? What did you do after you finished your conversation with Mr. Hammon?

A I had her fill out and sign a battery affidavit and I asked her if she would.

Q Provide to you State's Exhibit 1, Officer Mooney, can you identify that document?

A Yes, this is the Battery Affidavit which Amy filled out.

Q Is that a normal part, routine of your investigation in these type of matters?

A Yes.

Q And what's the purpose of that document?

A To establish events that have occurred previously.

Q Is your signature on the document?

A Yes it is.

[13] Q And did you witness the document being prepared?

A Yes I did.

Q What does the document recite then?

BY MR. SPAHR: Objection.

A It recites the events . . .

BY MR. SPAHR: Objection. The document will speak for itself. I'm not going to ask the Court to have this read into the record until such time it's offered and at that point I'll be glad to make an objection about it's [sic] admissibility.

BY MR. DAVIS: No further questions regarding the document. State would offer Exhibit 1.

BY MR. SPAHR: And we will object since the person who prepared the document is not here to cross-examine about the truth or veracity of the statements being made therein.

BY MR. DAVIS: I would note to the Court the uh . . . Affidavit is under oath.

BY MR. SPAHR: That doesn't give us the opportunity to cross examine to [sic] person who allegedly drafted it. Makes me mad.

BY THE COURT: You might want to refresh your memory regarding the hearsay rules. I would point you to Rule 803. Here. Right there. At what point in time

was this made, this statement made? When was it made during the course of your investigation?

A Towards the end.

BY THE COURT: Okay. I mean, that evening or . . .

A Yes that evening.

BY THE COURT: . . . three weeks later.

[14] A Yes.

Q Is it your practice to have a document prepared temporaneously with the event . . . with your investigation? Was it done at that same time you were there?

A Yes.

Q Was the person preparing the document doing so on the basis of recent events?

A Yes.

BY MR. SPAHR: Objection. Calls for conclusion on his part. He wasn't there to observe anything.

BY THE COURT: You may answer.

A Yes.

BY MR. DAVIS: We're going to offer the document Your Honor under a present sense of impression.

BY MR. SPAHR: It's a hearsay statement. No opportunity to cross-examine the witness.

BY THE COURT: I think that 803 states that a document that's filled out under a present sense impression the declarant availability is immaterial and I will show it admitted.

**PLAINTIFF'S EXHIBIT ONE SO OFFERED AND ADMITTED IS IN THE WORDS AND FIGURES, TO-WIT:**

Q Did you observe any injuries to Mrs. Hammon?

A No.

[15] Q Did she indicate to you that she has any injuries or pain?

A She was, while speaking to her she was rubbing her . . .

BY MR. SPAHR: Again, renew my objection to any statements attributed to her.

BY THE COURT: We'll show it as a continuing objection.

A While speaking to her she began rubbing her right eyebrow, above her right eyebrow and she informed me that that was where her head was shoved into the glass and it was hurting her at that time.

Q Did you review the Affidavit, State's Exhibit 1?

A No.

Q In regards to Ms. Hammon's statement in the Affidavit, is that concurrent with what she told you as to what happened to her?

A Yes it does.

Q Does she indicate in the Affidavit that she was hurt by being pushed to the ground?

A Yes it does.

Q Okay. Did Mrs. Hammon tell you that she and Hershel were married?

A Yes.

Q That she was Hershel Hammon's wife?

A Yes.

BY MR. DAVIS: No further questions.

**CROSS EXAMINATION**

**by**

**ROBERT SPAHR:**

[16] Q Officer, do you . . ., your earlier testimony is that you have been a Peru Police Department Officer for approximately three years.

A Yes.

Q All right. And how many times in your career have you been in the household of Amy and Hershel Hammon?

A To the best of my knowledge, zero.

Q Before this event?

A Correct.

Q So, had you had any opportunity at any earlier date than the date I think alleged, February 26th, 2003, to know whether or not a telephone was broken or a heater was broken?

A No.

Q Did you see the telephone broken?

A I did not see the telephone.

Q You saw the results of a broken telephone maybe?

A Correct.

Q You saw the results of a broken heater?

A Correct.

Q Have you ever had a woman lie to you in your life?

A Yes.

Q And then discovered that it was a lie what she said?

BY MR. DAVIS: I'm going to object, I don't know what the material basis of that is.

BY MR. SPAHR: Judge, the material basis is that in personal experience [17] sometimes people make complaints that are false or they make lies and I'm trying to build that he has no personal knowledge other than the statements she made. I believe that I have the right to inquire in his experience . . .

BY THE COURT: Go ahead.

BY MR. SPAHR: . . . of people in his capacity lied to him.

BY THE COURT: I'll overrule the objection. Go ahead.

Q Thank you. Your earlier testimony you had a woman at some time in your life lie to you.

A Yes.

Q In the course of your practice, your services to the City of Peru as a Police Officer have you ever had women lie to you about injuries that they have received?

A I'm not sure I can answer that question truthfully.

Q Well . . .

A I don't recall, I have no . . .

Q . . . just . . . if . . . if you're not sure. Have you ever had anybody make a false crime report?

A Yes.

Q Yeah. Does it necessarily mean it's only men who make false crime reports?

A No.

Q Do women sometimes make false crime reports?

A Sure.

Q From your standpoint were you in uniform when you came to the house on that day?

[18] A Yes I was.

Q All right. And were you carrying a gun?

A Yes I was.

Q And did you know Amy at all at that time when you first came to the door?

A I don't believe so.

Q Did you know of Hershel Hammon at that time?

A No. No.

Q All right. When Amy told you, or when that lady you met at the door told you that everything was okay, why did you pursue further inquiry when you were told that everything was okay?

A I didn't feel safe leaving the premises when we were responding to a call of a fight due to her state of frighteness. I didn't know if someone had told her to tell them everything was okay and that everything actually wasn't. It's my job to investigate further than just the beginning realms.

Q When you came to the door, did you hear arguments coming through the door?

A No.

Q The sound?

A No I could not.

Q Could you hear things crashing in the house?

A No.

Q At anytime while you were there did you see anything thrown or broken?

A No.

Q [Inaudible]?

[19] A No.

Q As I understand there were just two people in the house when you were there?

A Just two people?

Q Well I think your . . .

A Officers or . . .

Q . . . earlier testimony was Amy and, and Hershel. I didn't hear anybody else present.

A There were children there.

Q Children?

A Yes.

Q Okay. Do you know whose kids they were?

A I believe at least two of them were Amy and Hershel's.

Q I'm sorry I didn't understand.

A I believe that two of them were Amy and Hershel's.

Q Children. I see.

A Yes.

Q Were there more kids than that?

A Not that I recall.

Q Okay. From your standpoint, when Amy came to the door were you . . . other than she seemed timid or frightened or whatever, did you see any . . .

[END OF CD #03-20] [BEGINNING OF CD #03-21]

Q . . . injury to her person?

A No.

[20] Q Did she complain to you about pain at that moment?

A No.

Q Did you see any injury to her person?

A No

Q Does it come as a surprise to you that sometimes people argue?

A No.

Q We're talking husband and wife.

A Sure.

Q Does it come as any surprise to you that sometimes people throw things in the house?

A No.

Q Did she indicate that Hershel had thrown the telephone at her?

A I don't recall.

Q No, well you'd recall that if she said it. Did Hershel admit to you that he had thrown anything at her?

A No.

Q Did he admit to you that he had broken the heater?

A No.

Q Did he tell you that the heater was broken?

A No.

Q Did Hershel tell you that he had thrown Amy down?

A No.

Q Did you ask him?

A I don't recall.

[21] Q Did you ask him if he had broken the heater?

A I don't recall that either.

Q Did you ask him if he had broken a telephone?

A I don't recall.

Q Did you ask him about any injury above Amy's eye that was causing her some pain but wasn't evi[inaudible] as an injury?

A I don't recall.

Q What else do you recall that you observed in the house? Observed . . . eyes.

A Nothing. Nothing comes to mind.

Q I'll make it as easy as I can. Did you observe Hershel yelling at Amy?

A No.

Q Did you observe Hershel throw anything on Amy?

A No.

Q Did you observe Hershel push Amy down to the ground?

A No.

Q Did you observe Hershel hit or kick Amy?

A No.

Q Did you ever see any bruising on Amy that day?

A No.

BY MR. SPAHR: That concludes the questions of this witness.

BY THE COURT: Mr. Davis.

**RE-DIRECT EXAMINATION**

**BY**

**BRENT DAVIS:**

[22] Q Officer Mooney, I think you previously testified that uh . . . , Mr. Hammon . . . you approached him, he said "everything was okay."

A Yes.

Q Did that indicate to you that he was denying that anything happened?

BY MR. SPAHR: Objection. Beyond the scope of the questioning.

Q What did that indicate to you?

BY MR. SPAHR: Judge, this is beyond the scope of re-direct.

BY THE COURT: I don't think it is. You asked him about all of his observations and what was happening. I think it's continuation. Go ahead.

Q Mr. Spahr asked you in response . . . or in the questions about did you ask Mr. Hammon if he committed certain things towards Mrs. Hammon? You said you don't recall if you did or your recollection was you had not. My

question was, when you first encountered Mr. Hammon did he state that everything was okay?

A Yes.

Q And on the basis of that, did you feel the need to ask him further questions?

A No.

Q In your course of investigating these type of complaints, is it also a fact that defendants or persons committing batteries sometimes don't tell the truth too?

A Yes.

Q In your experience of investigating these types of matters, what would be your conclusion as to the most prevalent of parties telling . . . of parties telling you falsehoods?

[23] BY MR. SPAHR: Calls for conclusion on his part. How is he . . . he's not the ultimate Judge of this . . . of those other incidents that he was involved with, presumably a [Inaudible]. As to this particular incident is the issue and, I mean he can have his own conclusions I suppose as to what he observed in the house but . . . and I thought that was what he was testifying to but counsel's trying to broaden that sort of thing to, well how many other episodes in the community, well that's not relevant to this case.

BY THE COURT: I think that he's continuing the inquiry that you had regarding false complaints that are made and I think the inquiry is have there been false denials made to him also or is it his assumption that there are false denials made to him?

BY MR. SPAHR: Well, and I think Judge that in fact he got that answer but then to broaden it out as to a conclusion as to in effect a percentage of how many false denials there are and that's getting beyond the scope of his capacity as an expert.

BY THE COURT: I haven't . . . I don't think I've heard Officer Mooney's answer yet. I wasn't sure that I heard your answer.

BY MR. SPAHR: You didn't hear the answer I don't think.

BY MR. DAVIS: Respond to the question.

A No.

Q Do you have any sense regarding your training in investigating these matters which might be more likely of, I suppose Defendant or batterer to deny that activity or a person who was battering . . .

A Yeah . . .

[24] Q . . . giving a false report?

BY MR. SPAHR: I object to his qualifications.

Q Based upon your training again, observation.

BY THE COURT: Go ahead, you can answer.

Q What's your perception?

A I perceive that more often than I have been lied to by the batterer, the person committing the crime.

Q When you were talking with Mrs. Hammon, did you have any observations of Mr. Hammon at that time?

A I think it . . . to separate the two to investigate, another officer I believe was Officer Richardson was in the kitchen with Mr. Hammon at the beginning of my investigation. On at least two occasions that I can recall Mr. Hammon walked in the living [sic] while I was trying to speak to Mrs. Hammon. You know I can . . . , I can't assume why he did that, but I can . . . my observation of Mrs. Hammon when Mr. Hammon walked into the room was that she would become quiet, almost afraid to speak at that time.

Q Did Mrs. Hammon indicate to you that uh . . . the behavior of Mr. Hammon in relationship to her was, exhibited an angry manner? They . . . they weren't . . .

BY MR. SPAHR: Again objection.

Q Your observation of Mr. Hammon's mental state, you believe the activities to be in ang . . . touched her in an angry manner, pushed her down in an angry manner?

A Yes.

BY MR. SPAHR: Objection, never observed.

[25] BY THE COURT: I'll sustain that.

Q And describe Mr. Hammon's demeanor?

A Angry.

BY MR. DAVIS: No further questions.

**RE-CROSS EXAMINATION**

**BY**

**ROBERT SPAHR:**

Q Now bear with me now. Counsel just asked a question about his demeanor. Was Mr. Hammon angry when you came in the door? At first?

A I don't recall.

Q Well you just said he was angry so where was he angry?

A During my investigation Mr. Hammon became angry.

Q There we go. So, you're saying initially when you talked to him, he was okay? Is that correct? He wasn't angry?

A Could you define for me "okay"?

Q Well, you know pretty much as well as I do when people are angry you can tell. In either in stress in voice or facial. Was he angry with you when you first came in the door?

A No.

Q Okay. Was he polite to you?

A I don't believe he was polite either.

Q Excuse me?

A I don't believe he was polite either.

Q Okay. Um . . ., but he wasn't angry initially?

[26] A Initially.

Q Okay. Would you agree that at some point he became angry after you arrived?

A As opposed to before?

Q Ha, ha, I'm just talking about your observation. While he was in your presence initially when you came in the door, he wasn't angry. I think that's your testimony.

A Correct.

Q Okay. But he became angry after you've been in the home for a while?

A Yes.

Q Okay. Do you recall when he became angry?

A No I don't.

Q Was it about the same time as you telling him he was under arrest?

A No, I believe it was prior to that. I believe he became angry when I insisted that Mr. Hammon stay separated from Mrs. Hammon so that we can investigate what had happened. He felt as if it was his house, he should be able to move throughout his house as he wished.

Q Is that an unusual feeling for someone who lives at that residence?

A No, on the same scope he should have had the understanding that we need to investigate what was going on.

Q Okay. But the anger was directed to you folks as opposed to Amy?

A What I observed, yes.

BY MR. SPAHR: Okay. I think that's it. That's all.

BY MR. DAVIS: No further questions.

[27] BY THE COURT: Thank you Officer Mooney, you may step down.

**AND FURTHER THE WITNESS SAITH NOT.**

BY MR. DAVIS: State calls Gail Raber.

BY THE COURT: Would you raise your right hand please? Do you swear the testimony you present to the Court will be the truth, the whole truth, and nothing but the truth, so help you God?

BY MS. RABER: I do.

BY THE COURT: Have a seat right here please.

**DIRECT EXAMINATION**

**BY**

**BRENT DAVIS:**

Q Gail, I'm going to ask a couple questions, beginning, just state your name for the record please.

A Gail Raber.

Q And how are you employed?

A I am the secretary of the probation department.

Q How long have you been employed by the probation department?

A 11 years.

Q During your duration of probat . . . , or employment with the probation department, you've had an opportunity to observe probationers come in and out?

A Yes sir.

Q Okay. Do you recognize Hershel Hammon?

A Yes I do.

Q Okay. Is he in the Courtroom?

[28] A Yes he is.

Q Is he the gentleman sitting next to Mr. Spahr?

A Yes he is.

Q From your course of employment do you know if Mr. Hammon is presently on probation?

A He is yes.

Q Your Honor I would ask the Court to take judicial notice of an order of probation dated 18th day of October of 2002, signed by Honorable Bruce Embrey, Judge of the Circuit Court. Ms. Raber, when an individual is on probation, are there certain rules and regulations to be followed?

A Yes there are.

Q Is it your experience that one of the standard rules of probation would be that a probationer is not to commit any act which would be a crime either felony or misdemeanor?

A That's correct.

Q Have you had an opportunity to look at any documents indicating the dates of Mr. Hammon's probation?

A I believe by looking at the rules of probation it was October of 2002 to October of 2003.

Q Do you recall the length of time Mr. Hammon was on probation from that order?

A It would be one year from the date of 2002.

Q And the date of February 26th of 2003 would fall within the time prior to the expiration of probation?

[29] A Yes it would.

Q No further questions of Ms. Raber.

BY MR. SPAHR: No questions.

BY THE COURT: You can step down.

**AND FURTHER THE WITNESS SAITH NOT.**

BY MR. DAVIS: State rests.

BY MR. SPAHR: At this time the Defendant moves for a finding of not guilty on the CM-57, there's been no proof beyond a reasonable doubt for this Court to conclude that Mr. Hammon is guilty of the offense of Domestic Battery.

BY THE COURT: Could I have my exhibit back please? Thank you.

BY MR. DAVIS: [inaudible].

BY THE COURT: Yes I will so note that, that he was placed on probation October 18, 2002 by Order of the Honorable Bruce Embrey.

BY MR. DAVIS: Thank you.

BY THE COURT: Going to deny your motion Mr. Spahr for judgment on the evidence. Do you have any defense to present?

BY MR. SPAHR: Not presenting any evidence on CM-57.

BY THE COURT: Okay.

BY MR. SPAHR: Ask the Court for determination that there has not been proof by a preponderance of the evidence that there was in fact a probation order in place. Since the state failed to present as part of it's [sic] evidence which cause number they were referring to in soliciting the testimony of a probation secretary. I would indicate that the Court can't take judicial knowledge without reference to a cause number.

BY THE COURT: Well, I'm going to have to listen to the record then.

[30] BY MR. SPAHR: And I might add, there's no copy of the order placed into evidence.

BY THE COURT: It is in the Court's file and we started this trial in 52C01-0209-CM-356 and so I believe the Court does know the case that is being tried here and he referred to the probation order in that cause number so I will deny your motion.

BY MR. SPAHR: There's no evidence to be presented under 356.

BY THE COURT: All right.

BY MR. SPAHR: We rest.

BY THE COURT: Okay. Let me take a few minutes to look this over and look over my notes and I shall return.

OFF RECORD.

BY THE COURT: You can be seated. You can be seated.

BY MR. SPAHR: Can I please the Court?

BY THE COURT: Thank you Mr. Spahr.

BY MR. SPAHR: Just for the record if I may put it into the record Judge, the Court had earlier directed counsel to . . . was it's [sic] evidentiary rule 808, is that . . .

BY MR. DAVIS: 803.

BY MR. SPAHR: I'm sorry, 803.

BY THE COURT: 803 . . . 8.

BY MR. SPAHR: Okay, and we would ask the Court in reading that it appears both counsel, although I'm not trying to make an argument for you but in my review, law enforcement records, documents, are an exception, they do not . . . they're not included in the exception, the hearsay of exception and would ask the Court to [31] review that . . . that . . . is it paragraph 8?

BY THE COURT: It is 803 subsection, subparagraph 8.

BY MR. SPAHR: 8.

BY THE COURT: Uh-huh [yes].

BY MR. SPAHR: Again, and uh . . . , we believe that the statement taken by law enforcement and introduced through the officer that is attributed to Amy with not . . . , it would have been excluded in as much as law enforcement investigative report. They . . . they submit it to the person, they being law enforcement, submits it to the purported victim and the victim then completes it, law enforcement takes control and possession of the document at all times presumably because it came through this officer.

BY THE COURT: Mr. Davis.

BY MR. DAVIS: I think I concur . . . I concur with the fact that the Court finds that to be an investigative report. Which probably eliminated as an exception under 803.

BY THE COURT: Go to make a finding that the State has carried its burden and proven beyond a reasonable doubt that Hershel Hammon did commit Domestic Battery on Amy Hammon in Cause 52C01-0302-CM-57 and that subsequently a probation violation was filed in this Court in 52C01-0209-CM-356 and the State has established by a preponderance of the evidence that there was a violation of these rules of probation. I have a case Cox versus the State of Indiana, Court of Appeals case handed down September in 2002, 77NE 2d 1025 that is um . . . actually the trial of this case here and what the Appellate Court found specifically is that excited utterances are expressly permitted in these kinds of cases even if the declarant is [32] not available to testify. And on that basis I am finding Mr. Hammon guilty. Is there a recommendation as to sentencing and as to what we want to do

with probation violation, or do we want to reset this for sentencing?

BY MR. DAVIS: I would uh . . .

BY MR. SPAHR: We're ready today.

BY THE COURT: Do you have a recommendation Mr. Davis?

BY MR. DAVIS: I'm going to recommend that we reset?

BY THE COURT: How long do you want?

BY MR. DAVIS: Is it pre-sentence report?

BY THE COURT: It's a A Misdemeanor, do you want a pre-sentence?

BY MR. DAVIS: Do you want it modified . . .

BY MR. HUNERYAGER: Given what is involved, I don't know that it wouldn't be a bad idea.

BY THE COURT: Okay let's . . .

BY MR. HUNERYAGER: A short pre-sentence.

BY THE COURT: We've . . ., they are requesting a pre-sentence report and so I'm going to set this for four weeks from today.

BY THE COURT REPORTER: [Inaudible].

BY THE COURT: Let's have it on Friday morning. Our Thursday afternoons are getting pretty scarey [sic].

BY THE COURT REPORTER: June 6.

BY THE COURT: June 6th . . .

BY THE COURT REPORTER: At 9:00.

BY THE COURT: . . . at 9 A.M. And I'll direct the probation department to [33] prepare a pre-sentence report. Mr. Hammon you are to report to the probation department early next week so that they can begin collecting information to prepare a pre-sentence report. I've copied these, this case for each of counsel so that you can have copies of it.

BY MR. SPAHR: Thank you Judge.

BY THE COURT: Okay.

BY MR. SPAHR: So when are we set?

BY THE COURT: June 6.

BY MR. SPAHR: June 6.

BY THE COURT: 9 A.M.

BY MR. SPAHR: Thank you Your Honor.

BY MR. DAVIS: Thank you.

**AND THAT WAS ALL THE EVIDENCE HEARD ON THIS DATE AT THAT TIME.**

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STATE OF INDIANA,

SS;

COUNTY OF MIAMI,

**CERTIFICATE**

I, Tawna Leffel, Official Reporter of the Miami Circuit Court of Indiana, do hereby certify that I am the Official Reporter of said Court, duly appointed and sworn to report the evidence of causes tried therein;

That upon the trial in this cause held on May 9, 2003, I took on the recorder, all of the evidence given during the hearing in this cause, the objections of counsel thereto, and the rulings of the Court upon such objections; the introduction of exhibits, the objections thereto, and the Court's rulings thereon.

I further certify that the foregoing manuscript as prepared is a full, true, correct and complete copy of the recordings of said evidence.

**IN WITNESS THEREOF**, I have hereunto set my hand and affixed my Seal, this 19th day of August, 2003.

/s/ Tawna Leffel
TAWNA LEFFEL
OFFICIAL REPORTER

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[1] **06-06-03** BY THE COURT: This is State of Indiana versus Hershel Hammon. There are two cause numbers, 52C01-0209-CM-356 and 52C01-0302-CM-57. Mr. Hammon appears in person along with his attorney, Robert Spahr, and the State is present by Brent Davis. We're here today

for purposes of sentencing. We were in Court on May 9th for a bench trial and the Court found that the offense of Domestic Battery had been committed following trial. It looks like judgement of conviction has not been entered and I will now enter Judgment of Conviction for that offense as a Class A Misdemeanor. I have received a pre-sentence report from the probation department. Mr. Hammon did you have an opportunity to look over the pre-sentence report?

BY MR. HAMMON: Yes Your Honor.

BY THE COURT: Okay. And Mr. Hammon or Mr. Spahr, are there any factual or any factual corrections or additions that need to be made in the pre-sentence report?

BY MR. SPAHR: There are no changes to report to be requested.

BY THE COURT: Are you satisfied with the pre-sentence report, Mr. Hammon, in that it sets forth essentially what we have before us today?

BY MR. HAMMON: Yes Your Honor.

BY THE COURT: Okay. I'm interested in knowing what the recommendations of both counsel and the State might be in this matter. Mr. Davis.

BY MR. DAVIS: Your Honor, may I ask for clarification on the pre-sentence report regarding time served and offenses, under days served, this would be on page 10 . . .

BY THE COURT: I had a question about that too.

[2] BY MR. DAVIS: . . . 11 and 12. It in days served in some instances seems to be reasonable amount of time and in other instances it seems to be a good deal of time was served.

BY THE COURT: It looks like the clock never stopped running.

BY MR. DAVIS: Yeah. I just, is there some clarification on that or how's that work?

BY THE COURT: This is page . . . look at page 10.

BY MS. GUSTIN: [Inaudible].

BY THE COURT: Okay.

BY MS. GUSTIN: [Inaudible].

BY THE COURT: It looks like I just did a division of 5273, first one at the top of page 10 by 365 and I get 14 years. So it looks like the clock has just never stopped running on any of these.

BY MR. DAVIS: That's what I thought. That was the only question I had.

BY THE COURT: Okay. Do you have a recommendation Mr. Davis?

BY MR. DAVIS: With respect to the recommendation uh, on page 6, the State would adopt probation department's recommendations.

BY THE COURT: Mr. Spahr?

BY MR. SPAHR: We certainly are not uh . . . , in opposition to the recommendations set out in the probation officer's recommendation page.

BY MS. GUSTIN: [Inaudible] addition to the recommendation [inaudible].

BY MR. SPAHR: Would want to make one, point out one thing to the Court. The no contact provision seems . . . sorry Cathy, unrealistic since the very letter that's attached as part of . . . part of the Addendum to the report, signed by Amy Hammon, [3] indicates obviously she doesn't want a no contact order.

BY MS. GUSTIN: Right, and I [inaudible] see that after I filed the report [inaudible] recommendations.

BY MR. SPAHR: So there is no Protective Order in place involving these two people. We'd ask that the Court not have any . . . any provision for no contact at this point.

BY MR. DAVIS: I would not object to that.

BY THE COURT: Mr. Hammon?

BY MR. HAMMON: Yes ma'am.

BY THE COURT: What do you have to say . . .

BY MR. HAMMON: I have no problem . . .

BY THE COURT: . . . about sentencing?

BY MR. HAMMON: I think that . . . that would be a good thing for me right now.

BY THE COURT: It's very clear in what you have submitted to the probation department that you

acknowledge your problems are coming from substance abuse.

BY MR. HAMMON: Yes ma'am.

BY THE COURT: How long has it been since you've had a drink?

BY MR. HAMMON: I would say a week or two.

BY THE COURT: Okay.

BY MR. HAMMON: Approximately.

BY THE COURT: Still struggling with it then?

BY MR. HAMMON: Struggling but not as much as I was when all this first happened.

BY THE COURT: Okay. I'll adopt the recommendations of the probation [4] department then and sentence you to one year in the Miami County Jail. Suspend all except for 20 days with good time credit and credit for three actual days served. You are placed on probation for a period of one year and your probation in 52C01-0204 is extended for . . . will terminate in October of this year and therefore this probation will commence in October of this year. You are to complete the Court's drug and alcohol evaluation. Follow any recommendations that come from that. You are to complete an intake evaluation at Four County Counseling Center to determine whether it is most appropriate that you participate in a domestic violence program or the anger management program and successfully complete the recommended program. You are to pay Court costs in the amount of $132.00, probation initial fees and the monthly user fee and as I said participate in

the Domestic Violence Program as directed or counsel by Four County Counseling Center.

BY THE COURT REPORTER: There is a $300.00 cash bond.

BY THE COURT: We will show that forfeited to the Public Defender fund. Do we want to set a time when he reports to the jail or do you want to do that . . .

BY MR. HAMMON: I'd like to have time to do that.

BY MS. GUSTIN: [Inaudible].

BY THE COURT: Okay. You want to give me dates when you can report to the jail? You'll be doing 7 actual days.

BY MR. HAMMON: Right. Your Honor if you could just give me thirty to sixty days to do that I'll just probably serve it all at once.

BY THE COURT: Okay.

BY MR. HAMMON: Um, I go to the hospital a lot in Indy right now with my [5] mother and dealing with my father, he's not doing well at all right now either so, so but I will take care of that.

BY MR. SPAHR: Sixty days then?

BY MR. HAMMON: Sixty days.

BY THE COURT: Why don't we just set a date of September the 6th . . . or September the 5th, which is a Friday evening, report at 5:00 on September the 5th and you will be release [sic] then seven days later.

BY MR. HAMMON: And if I can get there before that that will be . . .

BY THE COURT: No, the jail will . . .

BY MR. HAMMON: Okay.

BY THE COURT: . . . expect you on September the 5th.

BY MR. HAMMON: I can't get it done before that if it's more convenient?

BY THE COURT: Well, our jail is not a hotel. They aren't equipped to take people as they show up and when I say September 5th, then they will be, they know that they have to take you at that point in time.

BY MR. HAMMON: That will be fine Your Honor.

BY MR. SPAHR: So Judge, that extends through to when? September 5 to?

BY THE COURT: He would be released then on Thursday evening at 5:00. Seven days actual.

BY MR. SPAHR: Okay. Thank you very much Judge.

BY THE COURT: Your [sic] welcome.

BY MR. SPAHR: Does that conclude the sentencing portion?

BY THE COURT: That concludes it.

BY MR. SPAHR: Okay. Judge, I'm making an oral motion for appointment [6] of the public Defender,

State Public Defender to represent Mr. Hammon in an appeal of the conviction. Um . . .

BY THE COURT: We'll show you appointed.

BY MR. SPAHR: I'll file . . . , I'll supplement it with a written motion Judge.

BY THE COURT: Okay.

BY MR. SPAHR: Ask leave to withdraw after Public Defender enters its appearance.

BY THE COURT: Okay.

BY MR. SPAHR: Thank you.

**AND THAT WAS ALL THE EVIDENCE HEARD ON THIS DATE AT THAT TIME.**

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STATE OF INDIANA,

SS;

COUNTY OF MIAMI,

**CERTIFICATE**

I, Tawna Leffel, Official Reporter of the Miami Circuit Court of Indiana, do hereby certify that I am the Official Reporter of said Court, duly appointed and sworn to report the evidence of causes tried therein;

That upon the sentencing hearing in this cause held on June 6, 2003, I took on the recorder, all of the evidence given during the hearing in this cause, the objections of counsel thereto, and the rulings of the Court upon such

objections; the introduction of exhibits, the objections thereto, and the Court's rulings thereon.

I further certify that the foregoing manuscript as prepared is a full, true, correct and complete copy of the recordings of said evidence.

**IN WITNESS THEREOF**, I have hereunto set my hand and affixed my Seal, this 19th day of August, 2003.

/s/ Tawna Leffel
TAWNA LEFFEL
OFFICIAL REPORTER

# STATE OF INDIANA
# PRESENTENCE INVESTIGATION REPORT
# FACE SHEET

Dated Ordered: 5-9-03
Date Completed: 5-27-03

**Warning:** This report is confidential according to Ind. Code 35-38-1-13 and may only be released with specific authorization.

(Filed May 29, 2003)

## COURT INFORMATION

Court: Miami Circuit Court /s/ Trudy McCrae
Clerk Miami Circuit Court
Judge: Rosemary Higgins Burke
Prosecutor: Eric Huneryager
Defense Attorney: Robert A. Spahr, Public Defender
Probation Officer: Cathy L. Gustin
Probation Dept.: Miami County Probation
Phone No. (765) 473-9861
Address: 25 Court Street, Peru, Indiana 46970

## OFFENDER INFORMATION

Case No.(s): 52C01-0302-CM-57
Charging Name(s): Hershel R. Hammon
True Name:
Alias(es):
Address: 69 N. Fremont
City: Peru State: IN Zip: 46970
Ph: None SSN: 434-41-2639
DOB: 3-26-68 POB: Elkhart, Indiana

Age: 35 Race: Cauc Sex: M Ht: 5'5" Wt: 148
Eyes: Green Hair: Brown
ID Marks: Tattoos: Left shoulder-heart; peacock

U.S. Citizen: YES X No Alien Status

Drivers License Number: 1140-00-6198
State of Issue: IN Status: HTV-suspended for life

**Criminal Involvement (Check all that apply)**

| | | |
|---|---|---|
| ___ Charge(s) Pending | X Jail | X Felony |
| X Probation | X Comm. Corr. | ___ Juvenile |
| ___ Res. Placement | ___ Detainers | X Prison |
| X Misdemeanor | ___ Parole | X Violation(s) |
| ___ Juv. Detention | ___ IBS/IGS | |

**OFFENSE INFORMATION**

Present Offense(s): Domestic Battery, Class A Misdemeanor

B.A.C.:

Arrest Date: 2-26-03 Type of release: $300 cash bond
Sentencing Date: 6-6-03 Jail Credit: 3 actual days
(2-26-03 to 3-1-03)

Co-Defendant(s):

Case No.(s):

**ADDITIONAL INFORMATION**

**COMMUNITY CORRECTIONS**

CHARGEBACK OFFENSE: Y N
CHARGE BACK IF SENT TO DOC: Y N
FACILITY/PROGRAM AT CAPACITY: Y N
STAFFED BY COMM. CORR.: Y N
OTHER INFORMATION:

**MARITAL INFORMATION**

___ S _X_ M ___ D ___ W ___ Sep

Spouse/Other: Amy L. Hammon
Address: 590 E. Fifth St.
City: Peru State: IN Zip: 46970 Ph: (765) 473-9064
Number of Dependent Children:
Court-ordered Support: $ per Wk Mo
Other:

**EDUCATION, EMPLOYMENT, HEALTH**

High School: Peru High School
Grad/G.E.D.: ___Y _X_ N Verified: Y _X_ N
College/Vocational:
Employer: None
Position: $___/hr.
Hire Date: Hrs. per wk:
Mental Health Referrals: Y _X_ N
Physical Problems: Y _X_ N
Alcohol/Drug Use: _X_ Y ___N

**CONTACT PERSONS**

1) Name: Amy Hammon Relation: Wife
Ph: (765) 473-9064
Address: 590 E. 5th St., Peru, IN 46970

2) Name: Duke Brown Relation: Father-in-law
Ph: (765) 473-7065
Address:

3) Other:

**SENTENCING INFORMATION**
**(Probation Use Only)**

CONVICTED BY: PLEA BENCH JURY
DATE:
CONVICTED OF:
EXECUTED TIME: SUSPENDED:
LENGTH OF PROBATION:
SPECIAL CONDITIONS:

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Hershel Hammon
52C01-0302-CM-57

## I. SOURCES OF INFORMATION

Hershel Hammon, Defendant
Records of the Miami County Prosecutor's Office
Records of the Miami County Probation Department
Records of the Miami County Clerk's Office
Records of the White County Probation Department
Records of the Bureau of Motor Vehicles

## II. PRIOR LEGAL HISTORY

A. Juvenile

See Cause No. M-207-85C in adult section.

B. Adult

**10-24-85 (conviction date) – Count I: Public Intoxication, Class B Misdemeanor; Count III: Illegal Possession or Consumption of an Alcoholic Beverage, Class C Misdemeanor. Miami County Cause No. M-207-85C.** Defendant is under the age of 18. Sentenced on Count I to 180 days Miami County Jail, suspended. Sentenced on Count III to 60 days Miami County Jail, suspended and concurrent to Count I. Count III: Resisting Law Enforcement was dismissed. Ordered to undergo a drug and alcohol evaluation. Placed on probation for one (1) year. Assessed court costs and probation user fees.

**1-20-87 (conviction date) – Operating a Vehicle While Intoxicated and Illegal Possession or Consumption of Alcohol. Miami County Cause No. 52D0-8701-CM-21.** Sentenced to one (1) year in the Department of Correction suspended. Placed on probation for one (1) year and ordered to undergo the Court's drug and alcohol evaluation. Assessed court costs and probation user fees.

11-12-87 Probation violation filed.

2-17-89 Found in violation. Balance imposed.

**12-17-89 (conviction date) – Operating a Vehicle with a B.A.C. of .10% or More; Failure to Prove Financial Responsibility. Miami County Cause No. 52D01-88-12-CM-338.** Sentenced to 60 days Miami County Jail on each count to run concurrently. Credit for time served. Ordered released for work and alcohol treatment. Assessed court costs and a fine.

**10-15-91 (conviction date) – Operating a Vehicle While Intoxicated, Class D Felony. Miami County Cause No. 52D01-9105-CF-24.** Sentenced to two (2) years in the Department of Correction, suspended except for 10 actual days. Placed on probation for two (2) years and ordered to serve 90 days home detention. Driver's license suspended for one (1) year. Ordered to undergo the Court's drug and alcohol evaluation. Assessed court costs and probation user fees.

**6-8-93 (conviction date) – Habitual Traffic Offender. Miami County Cause No. 52D01-9212-CF-92.** Sentenced to 1 ½ years in the Department of Correction, suspended except for 30 actual days. Placed on probation. Ordered to serve one (1) year home detention. Ordered not to operative a motor vehicle while on probation. Driver's license suspended for life. Assessed court costs, probation user fees, and a $200 fine.

2-15-94 Probation violation filed.
3-24-94 Found in violation and given credit for 6 days served.

**7-3-97 (conviction date) – Count I: Operating a Vehicle After Being Adjudged a Habitual Traffic Violator, Class D Felony; Count II: Operating a Vehicle While Intoxicated, Class A Misdemeanor. White County Cause No. 91D01-9703-CF-41.** Sentenced to three (3) years to the Department of Correction on Count I and one (1) year to the White Count [sic] Jail, concurrent. 1 ½ years suspended. Placed on probation for 1 ½ years.

12/98 Probation violation filed for testing positive for marijuana. The defendant reports being found in violation and serving 45 actual days in jail followed by 9 months of home detention.

**9-8-00 (conviction date) – Possession of Marijuana, Class A Misdemeanor. Miami County**

**Cause No. 52C01-0003-CM-143.** Sentenced to one (1) year in the Miami County Jail. Assessed court costs and the drug interdiction fee.

**10-18-02 (conviction date) – Battery, Class B Misdemeanor. Miami County Cause No. 52C01-0204-CM-356.** Sentenced to 180 days Miami County Jail, suspended. Placed on non-reporting probation for one (1) year. Assessed court costs and the initial probation user fee.
(The victim in this matter was his daughter.)

3-13-03 Probation violation filed. Pending.

**2-14-03 (conviction date) – Public Intoxication, Class B Misdemeanor. Miami County Cause No. 52C01-0210-CM-394.** Sentenced to 4 days Miami County Jail with good time credit. Assessed court costs.

**2-26-03 (offense date) – Domestic Battery. Miami County Cause No. 52C01-0302-CM-57.** Current offense.

C. Criminal Orientation

The defendant has four convictions for Operating While Intoxicated offenses as well as convictions for Illegal Consumption of Alcohol (2); Failure to Prove Financial Responsibility; Habitual Traffic Offender; Operating a Vehicle After Being Adjudged a Habitual Traffic Violator; Battery; Possession of Marijuana; and Public Intoxication. Between 1985 and 2003 the defendant has had 10 misdemeanor convictions and three felony convictions. He has been found in violation of probation in the past and was on probation for Battery when the current offense was committed. His driver's license is suspended for life. He denies gang affiliation and states he has no close friends or relatives currently serving time in the Department of Correction.

D. Summary of Legal History

Please see above.

## III. PRESENT OFFENSE

A. Official Version

The official version can be found in the probable cause affidavit and police reports beginning on p. 16.

B. Defendant's Version

The defendant submitted the following written statement:

"My wife and I were arguing. My wife tryed to explain to officers that everything was fine and they told her that if she did not sign a statement against her husband they would take our children away."

## IV. VICTIM IMPACT STATEMENT

Victim impact information was mailed to the victim in this matter, but no response had been received at the time of filing.

## V. FAMILY/PERSONAL BACKGROUND

A. Family

N/A

B. Marital/Dependent Status

N/A

C. Education

N/A

D. Employment

The defendant was employed at Five Star Foods in Peru from 7-1-88 to 9-1-02. He was fired following his arrest for the current arrest. He is not currently employed and receives $263 per week in unemployment. He would like to manage the meat department of another store.

E. Military

N/A

F. Financial

N/A

G. Religion

N/A

H. Interests/Leisure Activities

N/A

I. Future Plans

N/A

## VI. HEALTH

A. Physical

N/A

B. Mental

N/A

C. Substance Use

The defendant began consuming alcohol at age 15. His drink of preference is beer and he usually consumes up to ten when he drinks. He has numerous alcohol-related arrests. He first tried marijuana at age

16 and states at one time he smoked a couple of joints per week. He said his marijuana use can be attributed to his alcohol use because he "makes stupid decisions when drinking." He feels he has a problem with the abuse of alcohol. He states his wife would like him to stop drinking. She had filed for divorce but it was not pursued. The defendant reports participating in several court ordered substance abuse programs. He said he did not like AA but feels it helped him. He feels the AA approach dwells on the past too much. Following his arrest for the current offense the defendant asked this officer for assistance in obtaining long term substance abuse therapy. An appointment was scheduled for him with the drug and alcohol program director, but he failed to attend the appointment. He stated later he did not wish to be away from his parents who are terminally ill.

D. Present Attitude

The defendant submitted the following statement:

"My mother went into a coma March 22, 2002- also my fathers doctor said his heart is deseased to the point that there can be nothing else done for him. I do feel that an anger management class may be benificial to me.

All of My wife & my problem's stem from drinking and this year has cost a great financial burden. I right now receive $263.00 per week on unemployment so until I find another meat cutting job at least I am able to contribute to helping my wife catch up on our house taxes. We have paid on our home for around 12 yrs. It would be a shame to lose it. Also if I'm on probation I will still be able to help my father in the time he has left. My wife and I would like to reconciliate our marriage and possibly sell our home next year

and move out of the area preferably in the country-I feel it would be good for us as well as the children."

Signed: Hershel Ray Hammon

## VII. EVALUATION/SUMMARY

Hershel R. Hammon is a 35 year old male who has been found guilty of Domestic Battery, Class A Misdemeanor. He is before the court for sentencing.

The defendant is married but living separately from his wife who is the victim in this matter. He lost his job of 14 years at Five Star due to his arrest for the current offense.

The defendant has a lengthy criminal history. The defendant has four convictions for Operating While Intoxicated offenses as well as convictions for Illegal Consumption of Alcohol (2); Failure to Prove Financial Responsibility; Habitual Traffic Offender; Operating a Vehicle After Being Adjudged a Habitual Traffic Violator; Battery; Possession of Marijuana; and Public Intoxication. Between 1985 and 2003 the defendant has had 10 misdemeanor convictions and three felony convictions. He has been found in violation of probation in the past. He was on probation for Battery (daughter was the victim) when the current offense was committed. His driver's license is suspended for life.

The following aggravating and mitigating circumstances are submitted for the Court's consideration during sentencing:

### Aggravating

1. The defendant's criminal history.
2. Prior attempts at rehabilitation have failed.

3. The defendant was on probation for Battery when the current offense was committed.

**Mitigating**

None found.

## VIII. RECOMMENDATION

It is respectfully recommended Hershel R. Hammon be sentenced to one (1) year in the Miami County Jail, suspended except for twenty (20) days with good time credit and credit for three (3) actual days. He should be placed on drug and alcohol probation for one (1) year consecutive to the probation under 52C01-0204-CM-356 with the following special conditions:

1. He complete the Court's drug and alcohol evaluation and follow all recommendations for treatment.

2. He complete an intake evaluation at Four County Counseling Center to determine whether he is most appropriate for Domestic Violence Group or Anger Management counseling and successfully complete the recommended program.

3. The defendant have no contact with the victim unless she specifically asks the Court to allow him to have contact.

[Costs
Probation fees
Domestic violence]

Respectfully submitted,

/s/ Cathy L. Gustin
Cathy L. Gustin
Probation Officer
Miami Circuit/
Superior Courts

STATE OF INDIANA IN THE MIAMI CIRCUIT COURT

SS:

COUNTY OF MIAMI TERM: 2003

STATE OF INDIANA

VS.

HERSHEL R. HAMMON CAUSE NO. 52C01-0302-CM-57

**ADDENDUM TO PRESENTENCE INVESTIGATION REPORT**

(Filed May 30, 2003)

Attached is a letter received by this officer on 5-29-03 from Amy Hammon, the victim in this matter. She states that she would like to see her husband receive probation which would require him to go through counseling. She wrote that she did not feel threatened by her husband. She is not requesting restitution.

Respectfully submitted,

/s/ Cathy L. Gustin
Cathy L. Gustin
Probation Officer

[Original Letter Handwritten]

[Received 5-29-03 CG]

Cathy Gustin,

In answer to your letter there has been no damages or bills.

As for sentencing, I would like my husband, Hershel Hammon to receive counceling and go to AA, because it has helped him in the past. I would like to see him put on probation to ensure that it happens and where he can still work to help financially and be here to help with our children. I also need his help around the house for we're remodeling the house and plan to sell it so we can move out of town. I love my husband, I just want to see him stop drinking. I do not feel threatened by his presence.

Thank you.

Sincerely,

Amy L. Hammon

**FOR PUBLICATION**

ATTORNEY FOR APPELLANT:

**KIMBERLY A. JACKSON**
Indianapolis, Indiana

ATTORNEYS FOR APPELEE:

**STEVE CARTER**
Attorney General of Indiana
**NICOLE M. SCHUSTER**
Deputy Attorney General
Indianapolis, Indiana

**IN THE**
**COURT OF APPEALS OF INDIANA**

| | | |
|---|---|---|
| HERSHEL HAMMON, | ) | |
| Appellant-Defendant, | ) | |
| vs. | ) | No. 52A02-0308-CR-693 |
| STATE OF INDIANA, | ) | |
| Appellee-Plaintiff. | ) | |

APPEAL FROM THE MIAMI CIRCUIT COURT
The Honorable Rosemary Higgins Burke, Judge
Cause No. 52C01-0302-CM-57

**June 14, 2004**

**OPINION - FOR PUBLICATION**

**BARNES, Judge.**

**Case Summary**

Hershel Hammon appeals his conviction for domestic battery, a Class A misdemeanor. We affirm in part and reverse in part.

## Issues

The issues before us are:

I. whether the trial court erred by admitting into evidence statements made by the victim to the arresting officer; and

II. whether the trial court erred in allowing Hammon's $300.00 cash bond to be applied to administrative fees and to the costs of his representation by a public defender.

## Facts

The relevant facts most favorable to the conviction follow. On February 26, 2003, Peru police officer Jason Mooney was dispatched to 590 East Fifth Street. Upon his arrival, Officer Mooney approached the residence and spoke with A.H., who he thought was timid and frightened. Officer Mooney inquired of A.H. whether there "was a problem and if anything was going on," to which A.H. responded, "no." Tr. p. 8. However, when he entered the house, Officer Mooney observed that the living room was in a state of disarray with broken objects littering the floor. *Id.* at 9-10. Hammon told Officer Mooney that he and A.H. had argued but that it had been resolved and had "not become physical." *Id.* at 11.

Officer Mooney then separated Hammon from A.H., at which time A.H. told him that Hammon had physically attacked her by throwing her down into the glass from a shattered heater and that he punched her twice in the chest. *Id.* at 12. Officer Mooney did not notice any visible physical injuries to A.H. However, A.H. did indicate that she was in some pain as a result of the attack.

During the time when Officer Mooney separated Hammon from A.H., Hammon attempted to enter the room where Mooney was speaking with A.H. When Hammon approached, A.H. became quiet and seemed afraid. A.H. also completed a battery affidavit.

Hammon was arrested and charged with domestic battery. A bench trial was conducted on May 9, 2003. A.H. did not testify, but Officer Mooney testified regarding A.H.'s statements. Hammon was convicted of domestic battery, a Class A misdemeanor. Hammon appeals the conviction.

## Analysis

### *I. Admissibility of Victim's Statements*

Hammon first challenges the trial court's admission of statements made by A.H. to Officer Mooney and argues that the officer's testimony relaying the statements was not admissible under the excited utterance exception to the hearsay rule.[1] We review questions regarding the admissibility of evidence only for a manifest abuse of discretion resulting in an unfair trial. *Williams v. State*, 782 N.E.2d 1039, 1045 (Ind. Ct. App. 2003).

---

[1] Hammon also challenges the trial court's admission of the battery affidavit signed by A.H. and argues that it was incorrectly admitted under the present sense impression exception to the hearsay rule because A.H. did not make her statement at the same time that she perceived the event described in the statement. However, because we conclude that the trial court properly admitted Officer Mooney's testimony regarding A.H.'s statements, any error in admitting the battery affidavit was harmless because it was cumulative of Officer Mooney's testimony. *See Willis v. State*, 776 N.E.2d 965, 967 (Ind. Ct. App. 2002).

Pursuant to the Indiana Rules of Evidence, "hearsay" is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Ind. Evidence Rule 801(c). Certain exceptions to this rule may apply, including the excited utterance exception that is at issue in this case. Indiana Evidence Rule 803(2) defines an "excited utterance" as "a statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." Indiana courts have previously distilled this rule into three distinct elements that the party who seeks admission must prove: "(1) a startling event occurs; (2) a statement was made by a declarant while under the stress of excitement caused by the event; and (3) the statement relates to the event." *Williams,* 782 N.E.2d at 1046.

Officer Mooney testified that he responded to a domestic disturbance call and that when he encountered the victim, she seemed "frightened" and "timid." Tr. pp. 5, 7-8. Officer Mooney further testified that when he entered the residence, the living room was in "disarray," and he observed broken glass on the floor in front of a glass heating unit that appeared to be broken with flames coming out the front of the unit. *Id.* at 10. Officer Mooney then testified that when he removed Hammon from the room, A.H. informed him that she and Hammon had been engaged in an argument and that Hammon had broken things in the living room. Officer Mooney testified that A.H. told him that Hammon threw her down into the glass from the heater and that he punched her twice in the chest. *Id.* at 12. It is with the admission of this final statement that Hammon takes particular issue.

The facts of this case are similar to those in *Gordon v. State*, 743 N.E.2d 376, 378 (Ind. Ct. App. 2001). In *Gordon*, police responded to a domestic disturbance call and observed a woman who was "visibly shaking" and whose voice was "crackling and shaky." *Id.* The woman described to police the events that occurred the night of the battery, and the officer recounted her statements at trial. We held that the officer's testimony was correctly admitted into evidence under the excited utterance exception to the hearsay rule because the officer's observations illustrated that the victim was still upset by the startling event she described to the officer and that it was reasonable to infer that this event caused the victim's distress. *Id.* at 378.

We reach the same conclusion in this case. A startling event occurred at the residence before police arrived. Officer Mooney testified that upon entering the house, he observed broken objects littering the living room floor and flames escaping from a shattered heater. Such observations, particularly that of the broken heater, clearly indicate that a startling event had recently taken place. This element is satisfied.

Indiana Evidence Rule 803(2) further requires that the statement for which one seeks admission "was made by declarant while under the stress of excitement caused by the event." It is clear from Officer Mooney's description of A.H. as "timid" and "frightened" that he perceived her to still be under the stress of the event. Officer Mooney also stated that A.H. grew quiet when Hammon entered the room. Further, it is reasonable to infer that Officer Mooney responded promptly to the dispatch after receiving it and that he arrived in a timely manner such that, when he arrived, A.H. was still greatly affected by the earlier event.

Our supreme court has held that "[t]he amount of elapsed time between the incident and the utterance weighs in determining the ability of the witness to regain his or her composure and engage in reflective thought." *Holmes v. State,* 480 N.E.2d 916, 918 (Ind. 1985). Thus, "the heart of an inquiry is whether the declarant was incapable of thoughtful reflection." *Jones v. State,* 800 N.E.2d 624 (Ind. App. Ct. 2003). Further, "[t]he amount of time that has passed between the event and the statement is relevant but not dispostive [sic]." *Burdine v. State,* 751 N.E.2d 260, 264 (Ind. Ct. App. 2001), *trans. denied* (citing *Noojin v. State,* 730 N.E.2d 672, 676 (Ind. 2000)). "No precise length of time is required." *Gordon,* 743 N.E.2d at 378.

Although Officer Mooney did not testify as to the precise amount of time that passed between his receipt of the domestic disturbance dispatch and the time he arrived at the residence, he was justified in concluding that A.H. was still upset because of the startling event that led to the call. Further, given the officer's observations of A.H. as well as the state of her living room, the trial court did not abuse its discretion in finding that A.H. was still under the stress of the event at the time she made her statement to police. We reject Hammon's contention that A.H. was no longer under the stress of the event because the State failed to establish the precise length of time that passed before Officer Mooney arrived.

We next address the final element required to find that the declarant's statement was an excited utterance. Indiana Evidence Rule 803(2) requires that the statement at issue must be related to the startling event. A.H.'s statement clearly was related to the facts and circumstances surrounding the startling event and this element is met.

We are not persuaded by Hammon's argument that Officer Mooney's testimony should have been withheld because A.H. gave her statement in response to his questions. Our supreme court has held that "[a] declaration does not lack spontaneity simply because it was an answer to a question." *Yamobi v. State,* 672 N.E.2d 1344, 1346 (Ind. 1996). The fact that Officer Mooney questioned Hammon does not mean her statement was not an excited utterance. In sum, we hold that the trial court did not abuse its discretion in concluding that A.H.'s statement was an excited utterance.

Although we have concluded that A.H.'s statements to Officer Mooney fell under the excited utterance exception to the hearsay rule, that does not end our analysis today, given a recent and substantial change in Sixth Amendment jurisprudence announced by the United States Supreme Court while this appeal was pending. Specifically, the Court held in March of this year that when the prosecution seeks to introduce a "testimonial" out-of-court statement into evidence against a criminal defendant, the Confrontation Clause of the Sixth Amendment requires two showings: (1) that the witness who made the statement is unavailable; and (2) that the defendant had a prior opportunity to cross-examine the witness. *Crawford v. Washington,* ___ U.S. ___, 124 S. Ct. 1354, 1374 (2004). In reaching this holding, the Court squarely criticized and overruled *Ohio v. Roberts,* 448 U.S. 56, 100 S. Ct. 2531 (1980).[2] *Roberts* had established the rule that hearsay

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[2] Interestingly, Justice Scalia last summer criticized the majority in *Lawrence v. Texas,* ___ U.S. ___, 123 S. Ct. 2472 (2003), for not giving due regard to stare decisis and for its "surprising readiness to reconsider a decision rendered a mere 17 years ago in *Bowers v. Hardwick*." ___ U.S. ___, 123 S. Ct. at 2488 (Scalia, J., dissenting). However, Justice

(Continued on following page)

statements made by an unavailable witness were admissible against a criminal defendant if the statement fell "within a firmly rooted hearsay exception" or otherwise bore "particularized guarantees of trustworthiness." *Id.* at 66, 100 S. Ct. at 2539.

By contrast, the *Crawford* opinion held that "[l]eaving the regulation of out-of-court statements to the law of evidence would render the Confrontation Clause powerless to prevent even the most flagrant inquisitorial practices." *Crawford,* ___ U.S. at ___, 124 S. Ct. at 1364. The Court then undertook an analysis of the state of the common law in 1791, when the Sixth Amendment was adopted, to support its conclusion that the Framers intended the Confrontation Clause to allow the admission of out-of-court "testimonial" statements by an unavailable witness only if the defendant had a prior opportunity for cross-examination.[3] *Id.* at ___, 124 S. Ct. at 1365-66. Thus,

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Scalia's majority opinion in *Crawford* never mentions the principle of stare decisis and the readiness to overrule a case decided 24 years ago, much to Chief Justice Rehnquist's chagrin. *See Crawford,* ___ U.S. at ___, 124 S. Ct. at 1378 (Rehnquist, C.J., concurring in judgment).

[3] The Court stated that it did "accept" the principle that a defendant could forfeit the right to confrontation through wrongdoing, presumably meaning that if a defendant causes a witness' unavailability, he cannot claim Confrontation Clause protection. *See Crawford,* ___ U.S. at ___, 124 S. Ct. at 1370. Application of the "wrongdoing" exception to the Confrontation Clause undoubtedly will be difficult in many domestic violence cases where a victim does not cooperate with the prosecution. If that is the case, police and prosecutors may then have to embark on a separate investigation into whether the defendant caused the victim's unavailability. The question will probably also frequently arise as to what amounts to "wrongdoing" by a defendant in such a scenario, i.e. will only physical "wrongdoing" (another battery) by a defendant suffice, or can psychological pressure on a victim not to cooperate be enough, and if so, how is such pressure to be measured?

proper determination of whether an out-of-court statement is admissible against a criminal defendant is no longer solely governed by whether it falls within a recognized exception to the hearsay rule. Instead, if the statement was made in a situation where the defendant did not have an opportunity for cross-examination, the statement must be excluded if it is "testimonial." If a statement is "non-testimonial," its admission in a criminal trial is left "to regulation by hearsay law. . . ." *Id.* at ___, 124 S. Ct. at 1370.

The majority in *Crawford* expressly declined to give a precise definition to the crucial word "testimonial." *Id.* at ___, 124 S. Ct. at 1374.[4] It did offer some guidance, however. First, "testimonial" statements need not necessarily be ones given under oath; unsworn statements may also be "testimonial." *Id.* at ___, 124 S. Ct. at 1364-65. Second, the Court gave the following examples of "testimonial" statements:

> ex parte in-court testimony or its functional equivalent . . . such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially . . . extrajudicial statements contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions . . . statements that

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[4] Chief Justice Rehnquist, joined by Justice O'Connor, voted to uphold *Roberts* and strongly condemned the majority for not defining "testimonial," stating: "Rules of criminal evidence are applied every day in courts throughout the country, and parties should not be left in the dark in this manner." *Crawford*, ___ U.S. at ___, 124 S. Ct. at 1378 (Rehnquist, C.J., concurring in judgment).

> were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.

*Id.* at ___, 124 S. Ct. at 1364 (citations omitted).

From these generalities, the Court extrapolated that statements made during a police "interrogation" would qualify as "testimonial" statements. *Id.* Again, however, the Court declined to precisely define "police interrogation," aside from noting that it used "the term 'interrogation' in its colloquial, rather than any technical legal, sense." *Id.* at ___, 124 S. Ct. at 1365 n.4. It also found that the police questioning at issue in the case qualified as "interrogation" "under any conceivable definition" where the witness knowingly gave a recorded statement "in response to structured police questioning. . . ." *Id.* The Court also compared police "interrogation" to official pretrial examinations of witnesses by English magistrates or justices of the peace before England acquired a professional police force in the 19th century. *Id.* at ___, 124 S. Ct. at 1364-65. Finally, we note the Court dwelled at length upon the treason trial of Sir Walter Raleigh in 1603 and the out-of-court statements of Lord Cobham, Raleigh's alleged co-conspirator, contained in a letter and in an examination before the Privy Council, used to condemn Raleigh to death. *Id.* at ___, 124 S. Ct. at 1360.

With that background and context, we hold the statement A.H. gave to Officer Mooney was not a "testimonial" statement. It appears to us that the common denominator underlying the Supreme Court's discussion of what constitutes a "testimonial" statement is the official and formal quality of such a statement. A.H.'s oral statement was not given in a formal setting even remotely

resembling an inquiry before King James I's Privy Council; it was not given during any type of pre-trial hearing or deposition; it was not contained within a "formalized" document of any kind.[5]

The closer question is whether A.H.'s statement was produced during the course of a police "interrogation." Admittedly, A.H. gave her statement in direct response to questioning by Officer Mooney. However, we observe that the Supreme Court chose not to say that any police *questioning* of a witness would make any statement given in response thereto "testimonial"; rather, it expressly limited its holding to police "interrogation." We conclude this choice of words clearly indicates that police "interrogation" is not the same as, and is much narrower than, police "questioning." To the extent the Supreme Court said that it used the term "interrogation" "in its colloquial ... sense," we believe that reference to a lay dictionary for a definition of "interrogation" is appropriate. *Id.* at ___, 124 S. Ct. at 1365 n.4. "Interrogation" is defined in one common English dictionary as "To examine by questioning formally or officially." The American Heritage College Dictionary 711 (3d ed. 2000). This is consistent with our prior observation that the common characteristic of all "testimonial" statements is the formality by which they are produced. We also believe that "interrogation" carries with it a connotation of an at least slightly adversarial setting. *See* Roget's Thesaurus II 556 (Expanded ed. 1988) (listing as first definition of "interrogate" as "To question

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[5] A.H.'s battery affidavit would probably qualify as a "testimonial" statement, even if we were to conclude that it fell under a hearsay exception.

thoroughly and relentlessly to verify facts: *interrogate the captured soldier.*").

We thus hold that when police arrive at the scene of an incident in response to a request for assistance and begin informally questioning those nearby immediately thereafter in order to determine what has happened, statements given in response thereto are not "testimonial." Whatever else police "interrogation" might be, we do not believe that word applies to preliminary investigatory questions asked at the scene of a crime shortly after it has occurred. Such interaction with witnesses on the scene does not fit within a lay conception of police "interrogation," bolstered by television, as encompassing an "interview" in a room at the stationhouse. It also does not bear the hallmarks of an improper "inquisitorial practice." *See Crawford,* ___ U.S. at ___, 124 S. Ct. at 1364. Thus, we conclude that Officer Mooney's questioning of A.H. at her residence shortly after the incident occurred does not qualify as "police interrogation" and A.H.'s statements at that time were not "testimonial." The new rule announced in *Crawford* does not affect their admissibility.

We further note that the very concept of an "excited utterance" is such that it is difficult to perceive how such a statement could ever be "testimonial." "The underlying rationale of the excited utterance exception is that such a declaration from one who has recently suffered an overpowering experience is likely to be truthful." *Hardiman v. State,* 726 N.E.2d 1201, 1204 (Ind. 2000). To be admissible, an excited utterance "must be unrehearsed and made while still under the stress of excitement from the startling event." *Id.* "The heart of the inquiry is whether the declarants had the time for reflection and deliberation." *Id.* An unrehearsed statement made without time for

reflection or deliberation, as required to be an "excited utterance," is not "testimonial" in that such a statement, by definition, has not been made in contemplation of its use in a future trial. *See Crawford,* ___ U.S. at ___, 124 S. Ct. at 1364. We hold, given the nature of the police questioning in this case and nature of the statement itself, that A.H.'s statement to Officer Mooney was "non-testimonial" and admissible as evidence against Hammon, notwithstanding *Crawford* and Hammon's apparent lack of an opportunity to cross-examine A.H. regarding her statement.[6]

## *II. Proper Allocation of Cash Bond*

Hammon argues that the trial court erred in ordering that his $300.00 cash bond be retained to offset the costs of his defense by the public defender. The State concedes that the order was erroneous. We dealt with this issue in *Goffinet v. State,* 775 N.E.2d 1227, 1234 (Ind. Ct. App. 2002), *trans. denied,* where the Defendant's father paid Defendant's cash bond in its entirety and the trial court retained a portion of the bond payment to cover various fees. In that case, we held that Indiana Code Section 35-33-8-3.2(a)(2) "does not authorize the trial court to order any money retained from a bond remittance for any purpose unless the bond was a 10% cash or securities deposit." *Id.* at 1233-34. In this case, the State concedes that the trial court improperly retained Hammon's bond,

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[6] Hammon also argues that there is insufficient evidence to support his conviction, but the only basis for this argument is that Officer Mooney's testimony was improperly admitted. Because we find that the trial court properly admitted Officer Mooney's testimony, we also find that the evidence presented amply supported the conviction.

which was not a 10% deposit, and we agree. Therefore, we reverse this portion of the trial court's order.

## Conclusion

We find that the trial court did not abuse its discretion in admitting Officer Mooney's testimony relating a statement made by the victim following the battery. The Supreme Court's recent decision in *Crawford v. Washington* does not change this result. Therefore, we affirm Hammon's conviction. However, we reverse the trial court's order that Hammon's cash bond be retained. We affirm in part and reverse in part.

Affirmed in part and reversed in part.

KIRSCH, C.J., and FRIEDLANDER, J., concur.

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**In the**
**Indiana Supreme Court**

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No. 52S02-0412-CR-510

HERSHEL HAMMON,

*Appellant (Defendant below),*

v.

STATE OF INDIANA,

*Appellee (Plaintiff below).*

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Appeal from the Miami Circuit Court,
No. 52C01-0302-CM-57
The Honorable Rosemary Higgins Burke, Judge

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On Petition To Transfer from the
Indiana Court of Appeals, No. 52A02-0308-CR-693

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**June 16, 2005**

**Boehm, Justice.**

The Sixth Amendment as interpreted by the United States Supreme Court in *Crawford v. Washington*, 541 U.S. 36 (2004), prohibits the introduction in a criminal

trial of testimonial statements where the defendant had no opportunity to cross examine the person who made the statements. We hold that statements to investigating officers in response to general initial inquiries are nontestimonial but statements made for purposes of preserving the accounts of potential witnesses are testimonial. More generally, we conclude that testimonial statements are those where a principal motive of either the person making the statement or the person or organization receiving it is to preserve it for future use in legal proceedings.

**Facts and Procedural History**

At 10:55 p.m. on February 26, 2003, Peru Police Department Officers Jason Mooney and Rod Richard went to the Hammons' home in response to a reported domestic disturbance. When the officers arrived, the alleged victim, Amy Hammon, was on the front porch. Mooney testified that Amy appeared to be "somewhat frightened." When he asked whether there was a "problem" or "anything was going on" she answered "No . . . nothing was the matter" and that "everything was okay."

After receiving permission from Amy to enter the house, Mooney found a gas heating unit in the corner of the living room with fragments of its glass front on the floor and flames emerging from the resulting cavity. Hershel Hammon, Amy's husband, was in the kitchen. In response to Mooney's inquiry as to what had happened, Hershel stated that he and his wife had "been in an argument" but "everything was fine now" and the argument "never became physical." Officer Richard remained with Hershel in the kitchen while Mooney returned to the

porch and again asked Amy what had occurred. Mooney testified that:

> She informed me that she and Hershel had been in an argument. That he became irrate [sic] over the fact of their daughter going to a boyfriend's house. The argument became . . . physical after being verbal and she informed me that Mr. Hammon, during the verbal part of the argument was breaking things in the living room and I believe she stated he broke the phone, broke the lamp, broke the front of the heater. When it became physical he threw her down into the glass of the heater. . . .
>
> She informed me Mr. Hammon had pushed her onto the ground, had shoved her head into the broken glass of the heater and that he had punched her in the chest twice I believe.

Mooney then requested Amy to fill out and sign a battery affidavit reciting these allegations, and she complied.[1]

The State charged Hershel with Domestic Battery and also alleged that the battery violated the terms of his probation. The trial court consolidated Hershel's probation violation hearing and a bench trial on a domestic battery charge. The trial court explained that a preponderance of the evidence standard of proof would apply in evaluating the probation violation and a reasonable doubt standard would govern the domestic battery charge. Although the prosecutor had subpoenaed Amy, she was not present at

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[1] The affidavit stated that Hershel: "Broke our furnace and shoved me down on the floor into the broken glass and hit me in the chest and threw me down. Broke our lamps and phone. Tore up my van where I couldn't leave the house. Attacked my daughter."

the consolidated proceeding. Over Hershel's objections, Officer Mooney's testimony reporting Amy's oral statements was admitted under the excited utterance exception to the hearsay rule and Amy's affidavit was admitted as a present sense impression. The only other evidence was brief testimony by the secretary of the probation department establishing Hershel's probation status. The defense offered no evidence.

At the conclusion of the consolidated proceeding, Hershel was convicted of Domestic Battery and found to have violated parole based on the facts recited in the affidavit and in Mooney's account of Amy's statements to him. Hershel was sentenced to one-year imprisonment, with all but twenty days suspended. He was also instructed to complete a drug and alcohol evaluation, and a counseling program. Finally, the trial court allowed Hershel's $300.00 cash bond to be applied to administrative fees and the costs of his representation by a public defender.[2]

On appeal, the Court of Appeals upheld the court's admission of Amy's statements to Officer Mooney under the hearsay exception for excited utterances. *Hammon v. State*, 809 N.E.2d 945, 949 (Ind. Ct. App. 2004). The Court of Appeals did not decide whether the affidavit was properly

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[2] The State concedes that the trial court improperly retained Hershel's bond. The bond was a full cash bond, not a 10% deposit. The Court of Appeals reversed the trial court, agreeing with the State that Indiana Code section 35-33-8-3.2(a)(1) governing full cash bonds does not include the authority conferred in subsection (a)(2) to apply 10% deposit bonds to administrative costs. *Hammon v. State*, 809 N.E.2d 945, 953 (Ind. Ct. App. 2004). The State does not challenge this ruling here, and we summarily affirm the Court of Appeals on that issue. Ind. Appellate Rule 58(a)(2).

admitted, reasoning that the issue was academic because the affidavit was cumulative of Mooney's testimony and therefore harmless, if error at all. *Id.* at 948 n.1. We granted transfer. *Hammon v. State*, 2004 Ind. LEXIS 1031 (Ind. Dec. 9, 2004).

**Out of Court Statements as Evidence**

This case presents an all too familiar scenario: the police respond to a report of domestic violence, an apparent victim reports a battery, and the victim then does not testify at trial for reasons that are not conclusively documented in the record.[3] This fact pattern has historically presented troubling issues under state rules of evidence. As a result of the recent decision of the Supreme Court of the United States in *Crawford v. Washington*, 541 U.S. 36 (2004), we now must address the issue under both the Indiana Rules of Evidence and the Confrontation Clause of the Sixth Amendment to the Constitution of the United States.

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[3] Amy wrote to the court with respect to Hershel's sentencing: "In answer to your letter there has been no damages or bills. As for sentencing, I would like my husband, Hershel Hammon, to receive counceling [sic] and go to AA, because it has helped him in the past. I would like to see him put on probation to ensure that it happens and where he can still work to help financially and be here to help with our children. I also need his help around the house for we're remodeling the house and plan to sell it so we can move out of town. I love my husband, I just want to see him stop drinking. I do not feel threatened by his presence."

## I. Excited Utterance

Amy's statements to Mooney were admitted to establish the truth of the matters asserted, notably that Hershel had hit her and thrown her down. Accordingly, the statements are inadmissible hearsay unless an exception applies. In this case the trial court found Amy's statements to be "excited utterances" admissible under Indiana Evidence Rule 803(2).

The rules of most other jurisdictions include a provision similar to Federal Rule of Evidence 807, which allows hearsay not specifically admissible under one of the listed exceptions found in Rules 803 and 804 if it has "equivalent circumstantial guarantees of trustworthiness" and (A) "is offered as evidence of a material fact;" (B) "is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts;" and (C) "the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence." The proponent of the statement must provide sufficient notice to the adverse party before the statement can be used in a trial or hearing. Fed. R. Evid. 807.

The Indiana Rules of Evidence have no counterpart to this residual exception. As a result, the Indiana "excited utterance" exception has been interpreted broadly to permit admission of statements deemed trustworthy. For a hearsay statement to be admitted as an excited utterance three elements must be shown: (1) a startling event; (2) the declarant made the statement while under the stress of excitement caused by the event; and (3) the statement relates to the event. *Yamobi v. State*, 672 N.E.2d 1344, 1346 (Ind. 1996). In *Yamobi* we stated:

> While a declaration is generally less likely to be admitted if it is made long after the startling event, the amount of time that has passed is not dispositive. . . . [T]he central issue is whether the declarant was still under the stress of excitement caused by the startling event when the statement was made.

*Id.* (citations omitted). Admissibility turns on "whether the statement was inherently reliable because the witness was under the stress of an event and unlikely to make deliberate falsifications." *Davenport v. State*, 749 N.E.2d 1144, 1148 (Ind. 2001). Indiana appellate courts have found the exception available for statements made as much as thirty minutes after the event where the declarant was shot on the street and remained there wounded until police arrived. *See, e.g., Yamobi*, 672 N.E.2d at 1346-47. Under less stressful circumstances we have expressed doubt that such a lengthy period would qualify. *See, e.g., Davenport*, 749 N.E.2d at 1149 ("It seems somewhat of a stretch to conclude that a statement [by a witness] one half-hour after the discovery of the body was still made under the stress of the startling event.").

Whether a statement constitutes an excited utterance is essentially a factual issue subject to a clearly erroneous standard of review, sometimes described as the functional equivalent of abuse of discretion. *Id.* at 1148. In this case, the Court of Appeals affirmed the trial court based on Officer Mooney's observations that a "startling event occurred at the residence before the police arrived," and Amy's "timid" and "frightened" appearance when the police first saw her. *Hammon*, 809 N.E.2d at 949. It is unclear precisely how much time had passed between the event and the statement, but a prompt police response was

a reasonable inference from this record, and it is for the trial court to evaluate the credibility of Mooney's perceptions of Amy's stressed state. We agree that the trial court could properly infer that Amy's initial reports to Mooney were made while Amy was still under the stress of the alleged domestic violence and were unlikely to constitute an unreliable response. Accordingly, it was admissible evidence insofar as state law is at issue here.

## II. Confrontation Clause

Until *Crawford* was handed down, the foregoing conclusion under Evidence Rule 803 would resolve this case. *Crawford* expressly overruled *Ohio v. Roberts,* 448 U.S. 56, 66 (1980), which had held that the Sixth Amendment's Confrontation Clause was satisfied if a statement, though hearsay, was admitted under a "firmly rooted" exception to the hearsay rule. 541 U.S. at 67. *Crawford* makes clear that in a criminal prosecution any hearsay permitted under the rules of evidence is also subject to the defendant's right "to be confronted with the witnesses against him" under the Sixth Amendment to the United States Constitution. *Id.* at 38. As explained below, we take *Crawford* to hold that, at a minimum, the Sixth Amendment prohibits use of "testimonial" statements without the opportunity to cross-examine. Thus, no matter how "firmly rooted" the excited utterance exception may be, if an utterance is "testimonial," it is admissible only if "the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine." *Id.* at 59. *Crawford* thus makes clear that confrontation, not reliability, is the key to the Sixth Amendment right, which applies in state courts through the Fourteenth Amendment. *Douglas v. Alabama,* 380 U.S. 415, 418 (1965). Because it

turns only on confrontation, *Crawford* bars admission of some forms of out of court statements that have been viewed as sufficiently reliable to be admissible under Rules of Evidence.[4]

In this case it is not clear whether the declarant, Amy, was "unavailable" when she did not appear at trial after she had been subpoenaed. It is clear that the defendant, Hershel, did not have an opportunity to cross-examine Amy about her statements admitted through both the officer's testimony and her affidavit. Therefore, if either

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[4] *Crawford* cited "confessions" as an example of testimonial statements that are inadmissible without cross-examination. 541 U.S. at 51. Historically, confessions have been viewed as reliable, typically as against penal interest. Some forms of sworn testimony have also been viewed as sufficiently reliable. *See, e.g., Bintz v. Bertrand,* 403 F.3d 859, 867 (7th Cir. 2005); *Mungo v. Duncan,* 393 F.3d 327, 335-36 (2d Cir. 2004); *United States v. Massino,* 319 F.Supp.2d 295, 298-99 (E.D.N.Y. 2004). Because we conclude that the nontestimonial statements made in this case are sufficiently reliable, we do not address whether, after *Crawford,* the Sixth Amendment still bars admission of nontestimonial hearsay if it is deemed unreliable. *Compare United States v. Hendricks,* 395 F.3d 173, 179 (3d Cir. 2005) ("unless a particular hearsay statement qualifies as 'testimonial,' *Crawford* is inapplicable and *Roberts* still controls."); *United States v. Holmes,* 406 F.3d 337, 348 (5th Cir. 2005) ("With respect to nontestimonial statements, however, *Crawford* leaves in place the *Roberts* approach to determining admissibility."), *with United States v. Saget,* 377 F.3d 223, 227 (2d Cir. 2004) ("[W]hile the continued viability of *Roberts* with respect to nontestimonial statements is somewhat in doubt, we will assume for purposes of this opinion that its reliability analysis continues to apply to control nontestimonial hearsay, and that our precedents applying the *Roberts* analysis to such statements retain their force."); *Edward J. Imwinkelried, The Treatment of Prosecution Hearsay Under* Crawford v. Washington: *Some Good News But . . . ,* The Champion, Oct. 2004, at 16, 18 ("The [*Crawford*] majority's harsh criticism of *Roberts'* reliability standard makes it even more likely that the Court will eventually relax the standard for admitting nontestimonial hearsay.").

Amy's statement to Officer Mooney or her affidavit is "testimonial" then that evidence was not admissible against Hershel in his criminal trial, even though it qualifies for a hearsay exception and passes tests of reliability.

A. *Crawford v. Washington*

The Confrontation Clause of the Sixth Amendment provides that, "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." *Crawford* held that the defendant's confrontation right precluded admission of a taped police interview of the defendant's wife where state law prevented the wife from testifying.[5] Exclusion of this evidence was based solely on the inability of the defendant to examine the wife. The only issue was whether the statement was admissible in evidence under those circumstances. There was no misconduct alleged on the part of either the wife or the officers who conducted the interview, and no suggestion that use of the interview was improper for any purpose other than evidence at the defendant's criminal trial.

In *Crawford,* the majority noted that the meaning of "witnesses against" was ambiguous, and thus looked to history as an aid to interpreting the Confrontation Clause. 541 U.S. at 51. No Justice objected to this methodology. The Court began with a discussion of English common law,

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[5] According to the briefs filed in the United States Supreme Court, Crawford's wife was mirandized and interviewed by two police officers at the stationhouse. Although the transcript of the interview is not explicit on these points, it seems clear that no one else was present, and the recording was by audio tape and was not under oath.

including the treason trial of Sir Walter Raleigh[6] and the bill of attainder against Sir John Fenwick.[7] *Id.* at 43-47. The Court then charted the background of the Sixth Amendment's inclusion in the Constitution and discussed the early cases interpreting the Amendment. *Id.* at 53-59. From this history the Court drew two inferences as to the breadth of the Sixth Amendment: 1) "the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused;" and 2) "the Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." *Id.* at 50-51.

It has been observed that the Court did not definitively resolve whether any statements that are not testimonial are nevertheless subject to Sixth Amendment restraints, and if so, what form those statements might take.[8] As the Court put it, "even if the Sixth Amendment is

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[6] *See Raleigh's Case*, 2 How. St. Tr. 1, 15-16, 24 (1603). In Raleigh's trial for high treason, a letter written by Raleigh's alleged co-conspirator, Lord Cobham, implicated both Cobham and Raleigh. Cobham had also been examined in camera by the Privy Council and both the letter and his examination were introduced as evidence against Raleigh. *Crawford*, 541 U.S. at 43.

[7] *See Fenwick's Case*, 13 How. St. Tr. 537, 591-92 (H.C. 1696) (Powys). Sir John Fenwick's counsel objected to admitting the pretrial examination of a witness who had been "spirited away," on the ground that Fenwick had no opportunity to cross-examine the witness. The examination was nonetheless admitted and Fenwick was condemned. *Crawford*, 541 U.S. at 46.

[8] "[T]he decision did not define what constitutes testimony . . . [and] [p]erhaps more significantly, the Court failed to instruct conclusively whether any *non*testimonial statements receive the protection of

(Continued on following page)

not solely concerned with testimonial hearsay, that is its primary object." *Id.* at 53. We think, however, that the thrust of the Court's opinion in *Crawford,* and the basis on which we proceed, is that testimonial statements trigger Sixth Amendment confrontation rights. The Court gave several indications that only testimonial statements implicate the Sixth Amendment. The Court expressly noted, "not all hearsay implicates the Sixth Amendment's core concerns." *Id.* at 51. The Court's discussion following this observation seems to us to assume that these "core concerns" are testimonial statements and only those are excludable on Sixth Amendment grounds. In addition, the Court reconciled the historical presence of hearsay exceptions with its view of the Confrontation Clause by pointing out that, with the exception of dying declarations, "there is scant evidence that exceptions were invoked to admit *testimonial* statements against the accused in a *criminal* case."[9] *Id.* at 55 (emphasis in original). In subsequent discussion the Court expressly noted that although *White*

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the Confrontation Clause." *The Supreme Court 2003 Term,* 118 Harv. L. Rev. 25, 321-22 (2004) (emphasis in original).

[9] *See also Crawford,* 541 U.S. at 53-54, focusing on the Framers after reviewing English, Colonial, and early American experience:

> The historical record also supports a second proposition: that the Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination. The text of the Sixth Amendment does not suggest any open-ended exceptions from the confrontation requirement to be developed by the courts. Rather, the "right . . . to be confronted with the witness against him," . . . is most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding.

*v. Illinois*, 502 U.S. 346 (1992), rejected the notion that only testimonial statements implicate the Confrontation Clause, *Crawford*'s analysis "casts doubt on that holding." *Id.* at 61. And in conclusion the majority again expressly refrained from ruling on the point, but nevertheless observed, "Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law." *Id.* at 68. In any event, whether some nontestimonial statements may be subject to Sixth Amendment limitations is not before us today. This case turns on whether Amy's statements or her affidavit were "testimonial."

A precise definition of testimonial responses is yet to be worked out, but *Crawford* identified some core forms of testimony:

> Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial, and to police interrogations. These are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed.

*Id.* The Court also cited with apparent approval a formulation of testimonial statement as one that an "objective witness reasonably [would] believe . . . would be available for use at a later trial." *Id.* at 52. Although the Court identified these "core forms," the Court expressly left "for another day," and therefore left it to us and other courts across the United States to identify the boundaries, if any, of "testimonial" statements. *Id.* at 68.

B. *The Court of Appeals' Opinion in this Case*

The Court of Appeals concluded, "that the common denominator underlying the Supreme Court's discussion of what constitutes a 'testimonial' statement is the official and formal quality of such a statement." *Hammon*, 809 N.E.2d at 952. Accordingly, the court reasoned that the Supreme Court limited its holding in *Crawford* to "police 'interrogation,'" which "carries with it a connotation of an at least slightly adversarial setting." *Id.* The Court of Appeals held that "when police arrive at the scene of an incident in response to a request for assistance and begin informally questioning those nearby immediately thereafter in order to determine what has happened, statements given in response thereto are not 'testimonial.'" *Id.* This conclusion has been cited for the proposition that "[p]reliminary questions asked at the scene of a crime shortly after it has occurred do not rise to the level of an 'interrogation.' Such an unstructured interaction between officer and witness bears no resemblance to a formal or informal police inquiry that is required for a police interrogation as that term is used in *Crawford*." *People v. Corella*, 18 Cal. Rptr. 3d 770, 776 (Cal. Ct. App. 2004) (citing *Hammon*). *Accord State v. Veesenmeyer*, 2005 Minn. App. LEXIS 287, *10 (Minn. Ct. App. March 15, 2005) (citing *Hammon*); *State v. Alvarez*, 107 P.3d 350, 355 (Ariz. Ct. App. 2005) (citing *Hammon*); *Lopez v. State*, 888 So. 2d 693, 699 (Fla. Dist. Ct. App. 2004) (citing *Hammon*); *State v. Wright*, 686 N.W.2d 295, 302 (Minn. Ct. App. 2004) (citing *Hammon*).

In another frequently cited passage, the Court of Appeals stated that "the very concept of an 'excited utterance' is such that it is difficult to perceive how such a statement could ever be 'testimonial.' . . . An unrehearsed

statement made without time for reflection or deliberation, as required to be an 'excited utterance,' is not 'testimonial' in that such a statement, by definition, has not been made in contemplation of its use in a future trial." *Hammon*, 809 N.E.2d at 952-53. The Court of Appeals has repeated this view in three other published opinions. *Beach v. State*, 816 N.E.2d 57, 59 (Ind. Ct. App. 2004); *Rogers v. State*, 814 N.E.2d 695, 701 (Ind. Ct. App. 2004); *Fowler v. State*, 809 N.E.2d 960, 963-64 (Ind. Ct. App. 2004).

The proposition that an excited utterance is per se nontestimonial has been accepted by some courts and rejected by others. The Colorado Court of Appeals agreed with this reasoning: "We also agree with the *Fowler* court's conclusion that classification of a statement as an excited utterance, while not dispositive, supports a conclusion that a statement is nontestimonial. . . . [W]e hold that where, as here, a victim makes an excited utterance to a police officer, in a noncustodial setting and without indicia of formality, the statement is nontestimonial under *Crawford*." *People v. King*, 2005 Colo. App. LEXIS 111, *14-16 (Colo. Ct. App. Jan. 27, 2005). However, the court noted, "there may nevertheless be unanticipated circumstances, similar in nature, that would warrant a different conclusion." *Id.* at *16. The California Court of Appeals took issue with this view. *People v. Kilday*, 20 Cal. Rptr. 3d 161, 173 n.9 (Cal. Ct. App. 2004), *partially vacated by* 105 P.3d 114 (Cal. 2005) ("to the extent that [*Hammon*, 809 N.E.[2d] at 952-53 and *Fowler*, 809 N.E.2d at 963-64] can be read to limit the application of *Crawford* to formal interrogations, we disagree"). The Florida Court of Appeals echoed this disagreement: "While this argument has some appeal at least on the surface, we do not think that excited utterance

can be automatically excluded from the class of testimonial statements." *Lopez,* 888 So.2d at 699. *Accord Stancil v. United States,* 866 A.2d 799, 809 (D.C. 2005) (adopting the reasoning in *Lopez* that looks to nature of excited utterance).

For the reasons given below, we agree with the Court of Appeals in its view that responses to initial inquiries at a crime scene are typically not "testimonial." We do not agree, however, that a statement that qualifies as an "excited utterance" is necessarily nontestimonial. The Court of Appeals is likely correct that the declarant of an excited utterance will ordinarily lack the requisite motive because the heat of the moment makes it unlikely that the declarant is focusing on preservation rather than communication of information. But an interrogating officer may be so motivated. Thus, the "structured questioning" identified by some courts as an indicium of a testimonial statement may be best understood as evidence of a purpose to elicit testimonial statements.

### C. *Other Courts' Efforts to Define "Testimonial"*

As predicted by Chief Justice Rehnquist in his separate opinion in *Crawford:* "prosecutors need answers as to what beyond the specific kinds of 'testimony' the Court lists is covered by the new rule." 541 U.S. at 77 (Rehnquist, C.J., concurring in result). Of course, the same is true of judges. *Crawford* has had major implications for the criminal courts in every United States jurisdiction, and the predicted spate of appellate efforts to give guidance to trial courts on this point is underway.

Some courts have attempted to provide general guidelines to assist trial courts when deciding whether a

statement is testimonial under *Crawford*. The Colorado Court of Appeals identified testimonial statements as generally those which are: "(1) solemn or formal statements (not casual or off-hand remarks); (2) made for the purpose of providing or establishing facts in judicial proceedings (not for business or personal purposes); (3) to a government actor or agent (not someone unassociated with government activity)." *People v. Compan*, 100 P.3d 533, 537 (Colo. Ct. App. 2004). By describing the second factor as the purpose for which the statement is "made," this formulation may be read to focus on the motivation of the declarant. *See also People v. Caudillo*, 122 Cal. App. 4th 1417, 1439 (Cal. Ct. App. 2004) (911 calls are not within the core class of testimonial statements); *People v. Moscat*, 777 N.Y.S.2d 875, 879 (N.Y. Crim. Ct. 2004) ("A 911 call for help is essentially different in nature than the 'testimonial' materials that *Crawford* tells us the Confrontation Clause was designed to exclude.").

The type of statement and its audience are undoubtedly important factors in determining whether the statement is testimonial. A spontaneous exclamation by a victim to a friend, family member, or coworker is not likely to be regarded as testimonial. *See, e.g., People v. Griffin*, 93 P.3d 344, 369 (Cal. 2004) (victim's statement to a friend at school that defendant had been fondling her for some time and she intended to confront him was not testimonial hearsay within the meaning of *Crawford*); *People v. Garrison*, 109 P.3d 1009, 1011 (Colo. Ct. App. 2004) (murder victim's statements to her manager that the defendant was harassing her and threatening to kill her were admissible); *People v. Vigil*, 104 P.3d 258, 265 (Colo. Ct. App. 2004) (child sexual abuse victim's statements to his father admissible against the defendant); *Herrera-Vega v. State*,

888 So. 2d 66, 69 (Fla. Dist. Ct. App. 2004) (child's statements to parents reporting a "touching" were not testimonial); *Demons v. State,* 595 S.E.2d 76, 79-80 (Ga. 2004) (victim's statement to coworker that the defendant had threatened to kill the victim is admissible).

Statements made to police officers or other agents of the State are more likely to be testimonial. *See, e.g., In re Rolandis G.,* 817 N.E.2d 183, 190 (Ill. Ct. App. 2004) (seven-year-old made the same statement to his mother, a police detective, and a child abuse investigator, but only the statement to his mother was nontestimonial); *In re T.T.,* 815 N.E.2d 789, 801 (Ill. Ct. App. 2004). This is true even if the police attempt to receive the statement in a "casual" and "friendly" atmosphere. *See, e.g., People ex rel R.A.S.,* 111 P.3d 487, 489 (Colo. Ct. App. 2004) (child's videotaped statements to police in a question and answer format were testimonial); *Vigil,* 104 P.3d at 262 (child's videotaped statements to police were testimonial even though given in a relaxed atmosphere, with open-ended, nonleading questions, and with no oath); *People v. Mileski,* 2004 Mich. App. LEXIS 3022, *7 (Mich. Ct. App. Nov. 4, 2004) (unpublished opinion) (because nurse Garland, in her capacity as a forensic nurse, acted as an arm of the police and prosecution in questioning the complainant, the statement at issue was testimonial).

Some decisions have focused on whether the questioning was "structured." For example in *State v. Barnes,* 854 A.2d 208, 211 (Me. 2004), a year-and-a-half before she was murdered, a mother drove herself to the police station sobbing and reporting that her son had assaulted her and had threatened to kill her more than once during the day. The court held that her statements were not testimonial

because: 1) the police did not seek her out; 2) the statements were made when the victim was still under the stress of the assault; and 3) she was not responding to tactically structured questioning. *Id.* at 211-12.

Other decisions have focused on the audience's purpose in eliciting the statement. *See United States v. Mikos,* 2004 U.S. Dist. LEXIS 13650, *17 (N.D. Ill. July 16, 2004) (Department of Health and Human Services agents interviewed a victim of a doctor under investigation. "HHS Agents interviewed Brannon as part of a formal healthcare fraud investigation. Their purpose was to gather information for potential use against Mikos at trial, thus, the Court finds that Brannon's statements to the HHS Agents fall within the realm of testimonial statements."); *United States v. Saner,* 313 F. Supp. 2d 896, 901-02 (S.D. Ind. 2004) (a target's ex parte statements to a prosecutor who visited the target's home were testimonial because the prosecutor was procuring these statements "with an eye toward trial"); *State v. Vaught,* 682 N.W.2d 284, 292 (Neb. 2004) (because the four-year-old victim clearly understood that a medical examination was being performed, and the purpose of the doctor's questions was to assist in medical diagnosis and treatment, the victim's statements were not testimonial).

In *Kilday,* police responded to a call from the victim's employer claiming possible domestic abuse. 123 Cal. App. 4th 406 (2004), *partially vacated by* 105 P.3d 114 (Cal. 2005). When the police arrived the victim was upset, frightened, and reluctant to speak to the police and offered only minimal information. An hour later, a female officer arrived and after being briefed on the scene, was able to elicit more information. Ultimately, the victim gave a tape-recorded statement to the police. The court held that only

the first statement was nontestimonial because the officers "were not producing evidence in anticipation of a potential criminal prosecution in eliciting basic facts from Kiernan about the nature and cause of her injuries." *Id.* at 422. However, the court qualified its holding:

> In reaching this conclusion, we do not adopt a blanket rule that all statements obtained from victims or witnesses by police officers responding to emergency calls are necessarily nontestimonial. The determination whether a statement obtained through police questioning in the field is testimonial requires a case-specific, fact-based inquiry. Under *Crawford,* this inquiry must center around whether the officer involved was acting in an investigative capacity to produce evidence in anticipation of a potential criminal prosecution.

*Id.* Since the "responding officers were still principally in the process of accomplishing the preliminary tasks of securing and assessing the scene," the victim's initial responses were not testimonial. *Id.* The court also took the view that an interpretation of *Crawford* that makes the presence or absence of indicia of formality determinative is inconsistent with the Supreme Court's focus on the "production of testimonial evidence," which may occur during relatively informal questioning in the field. *Id.* at 421.

Finally, several courts have adopted essentially a "totality of the circumstances" approach, focusing on the "reasonable belief" of an "objective witness." *People v. Lee,* 124 Cal. App. 4th 483, 489 (Cal. Ct. App. 2004), *review granted,* 26 Cal. Rptr. 3d 302 (Cal. 2005) (some 911 calls may be made under circumstances which would lead an objective witness reasonably to believe that the statement

would be available for use at a later trial); *People v. Cortes*, 781 N.Y.S.2d 401, 406 (N.Y. Sup. Ct. 2004) (911 call reporting an ongoing crime and describing the perpetrator is testimonial); *State v. Powers*, 99 P.3d 1262, 1266 (Wash. Ct. App. 2004) (the trial court, on a case-by-case basis, can best assess the proposed admission of a 911 recording as testimonial or nontestimonial and whether the statement arises from interrogation).

### E. *Testimonial Statements as Turning on the Motives of Both Questioner and Responder*

As observers predicted, we must look to the references in *Crawford* to "testimonial" statements to attempt to give clear guidance to trial courts as to what is and what is not prohibited by the Sixth Amendment. Justice Scalia, who authored the *Crawford* majority opinion, joined the concurring opinion of Justice Thomas in *White v. Illinois*, 502 U.S. 346, 358 (1992), arguing for a construction of "testimonial" statements limited to affidavits, depositions and the like. However, *Crawford* itself demonstrates that the term has a broader scope and applies at least to some interviews with victims or other witnesses. After considering the views of the Court of Appeals and the courts of other jurisdictions, we conclude that a "testimonial" statement is one given or taken in significant part for purposes of preserving it for potential future use in legal proceedings. In evaluating whether a statement is for purposes of future legal utility, the motive of the questioner, more than that of the declarant, is determinative, but if either is principally motivated by a desire to preserve the statement it is sufficient to render the statement "testimonial." If the statement is taken pursuant to established procedures, either the subjective motivation of

the individual taking the statement or the objectively evaluated purpose of the procedure is sufficient.

Support for this view is found in the majority's response to Chief Justice Rehnquist's contention that the fact "[t]hat a statement might be testimonial does nothing to undermine the wisdom of one of these [hearsay] exceptions." *Crawford,* 541 U.S. at 56 n.7. The majority contended that "[i]nvolvement of government officials in the production of testimony with an eye toward trial" was unequivocally dangerous. *Id.* These portions of *Crawford*'s analysis make clear that government involvement is typical but not essential to a "testimonial" statement. Its development "with an eye toward trial" is in our view the critical component.

We think the "use in legal proceedings" test is consistent with other language in *Crawford.* The Court identified three formal testimonial situations: 1) testimony at a preliminary hearing; 2) testimony before a grand jury; and 3) testimony at a former trial; and two substantial equivalents: 4) statements made in "police interrogation;" and 5) statements made by a defendant incident to entering a guilty plea ("plea allocutions"). *Id.* at 68. The first three and the fifth certainly are statements made by the declarant and obtained by the receiver for use in a legal proceeding. Only the fourth of these is problematic. Any question by a police officer can be described as a "police interrogation," and the Court was careful in *Crawford* to note that it used the term "in its colloquial, rather than any technical legal, sense." *Id.* at 53 n.4. We understand "police interrogation" in this context certainly to include documented structured questioning recorded in written, audio, or video devices or any other means permitting the questions and statements to be preserved and presented to

a court. That is what happened in *Crawford* itself. The frequently presented issue is whether a "police interrogation" is broader than a grilling and also extends to some or all of dealings such as the exchange between Amy and Mooney. To be sure, the very same conversation may evolve into testimonial statements. We think, however, that the other examples given by the Supreme Court indicate that a "police interrogation" is properly limited to attempts by police to pin down and preserve statements rather than efforts directed to determining whether an offense has occurred, protection of victims or others, or apprehension of a suspect. We think judged by the "use in legal proceedings" standard, responses to initial inquiries by officers arriving at a scene are typically not testimonial.

The Court also identified as one potential definition of testimonial statements those given under circumstances that would lead an "objective witness reasonably to believe that the statement would be available for use at a later trial." *Id.* at 52. This last clue is equally vexing. It is not clear whether we are to judge the expectations of an "objective witness" by the standard of a witness knowledgeable in the law and/or a witness with no particular awareness of the use a court might make of the statement. We assume the "witness" referred to is the person giving the statement, not an observer of the statement. The *Crawford* majority gives as an example of a "nontestimonial" statement a statement of the defendant's co-conspirator to a fellow inmate, citing *Dutton v. Evans,* 400 U.S. 74 (1970). *Id.* at 57. The declarant (the co-conspirator) presumably did not expect his statements to become a piece of evidence at the defendant's trial, but an objective observer knowledgeable in the law would anticipate that possibility. Accordingly, we take this definition to exclude

statements that most people in the shoes of the declarant would consider as designed to convey information, even if a lawyer might recognize them as potentially admissible in court.

F. *Resolution of this Case*

Amy's statement to Mooney and the affidavit present different issues and neither falls clearly within the core testimonial statements identified in *Crawford*. For the reasons given above, we believe that whether a statement from a declarant to a police officer is testimonial will hinge upon the intent of the declarant in making the statement and the purpose for which the police officer elicited the statement. If the declarant is making a statement to the police with the intent that his or her statement will be used against the defendant at trial, then the statement is testimonial. Similarly, if the police officer elicits the statement in order to obtain evidence in anticipation of a potential criminal prosecution, then the statement is testimonial. We recognize some commentators have taken a broader view of *Crawford*'s prohibition. *See, e.g.*, Andrew Siegal, *Court is Adjourned – What Have We Learned?*, 16 S. Carolina Lawyer 14, 20 (Sept. 2004) (use of police officer's report of alleged domestic-violence victim's statement "almost certainly" unconstitutional under *Crawford*). Under our view of the standard for a testimonial statement, however, the motivations of the questioner and declarant are the central concerns. These present factual issues as to which the findings of the trial court should be upheld unless clearly erroneous. Because the admissibility of Amy's statements arose in the trial court before *Crawford* was decided, there were no rulings other than a finding that Amy's statements were excited utterances.

Despite the absence of findings, we think the undisputed facts are sufficient to determine that the initial exchange between Mooney and Amy fell into the category of preliminary investigation in which the officer was essentially attempting to determine whether anything requiring police action had occurred and, if so, what. Officer Mooney, responding to a reported emergency, was principally in the process of accomplishing the preliminary tasks of securing and assessing the scene. Amy's motivation was to convey basic facts and there is no suggestion that Amy wanted her initial responses to be preserved or otherwise used against her husband at trial. Accordingly, her oral statement was not testimonial.

The affidavit is another story. After Amy explained to Officer Mooney what had happened between her and the defendant, Mooney asked Amy to complete and sign the affidavit. Clearly, the purpose in securing the affidavit was to record and document Amy's account, and at least one principal reason to preserve Amy's story was to provide a basis for its use as evidence or impeachment in Hershel's potential criminal prosecution. We think that for these purposes it is irrelevant whether that was Mooney's subjective conscious purpose, or Mooney was simply following procedures designed by others to accomplish, among other things, the goal of preserving the statement for potential legal use. Therefore, the admission of the affidavit was in violation of Hershel's constitutional rights under the Confrontation Clause. *See People v. Shreck,* 107 P.3d 1048, 1060-61 (Colo. Ct. App. 2004) (affidavits provided solely to authenticate documentary evidence do not violate the Confrontation Clause, but authenticating affidavits that are used to prove the material facts of

habitual criminal proceedings were in violation of the Confrontation Clause).

The Court of Appeals affirmed the trial court on the ground that "any error in admitting the battery affidavit was harmless because it was cumulative of Officer Mooney's testimony." *Hammon*, 809 N.E.2d at 948 n.1. "Error in the admission of evidence may be harmless when the evidence is merely cumulative of other properly admitted evidence. *Black's Law Dictionary* 596 (8th ed. 2004) defines cumulative evidence as 'additional evidence that supports a fact established by the existing evidence (especially that which does not need further support).'" *Witte v. Mundy*, 820 N.E.2d 128, 135 (Ind. 2005).

It is true that the affidavit merely repeated the substance of Amy's oral statements to Officer Mooney. However, we do not think that is the end of the inquiry. *Crawford* teaches that the admission of testimonial hearsay violates the Sixth Amendment to the Constitution of the United States. Under *Chapman v. California*, 386 U.S. 18 (1967), *overruled on other grounds by Estelle v. McGuire*, 502 U.S. 62 (1991), federal constitutional errors must be harmless beyond a reasonable doubt. *See Neder v. United States*, 527 U.S. 1, 15 (1999). As *Crawford* makes clear, our views on alternative means of assuring reliability or trustworthiness of an out-of-court statement are irrelevant for Sixth Amendment purposes. Other means of assuring reliability are not substitutable for confrontation and cross examination: "The Constitution prescribes a procedure for determining the reliability of testimony in criminal trials, and we, no less than the state courts, lack authority to replace it with one of our own devising." *Crawford*, 541 U.S. at 67.

Evaluation of potential harm from the affidavit is difficult to resolve on the sparse record. Some decisions have held testimonial statements such as Amy's affidavit to be admissible *because* they were testimonial (for example under oath) and therefore reliable. *See, e.g., United States v. Gallego,* 191 F.3d 156, 168 (2d Cir. 1999) (plea allocution); *United States v. Papajohn,* 212 F.3d 1112, 1120 (8th Cir. 2000) (grand jury); *Nowlin v. Commonwealth,* 579 S.E.2d 367, 371-72 (Vir. Ct. App. 2003) (statement made to police while defendant was in custody on pending charges was deemed to be more clearly against penal interest and thus more reliable). *Crawford* plainly rejects this contention. *Crawford,* 541 U.S. at 65 (describing it as adding "insult to injury"). *Crawford* makes clear that reliability derived from formality or any other source does not justify doing away with the confrontation requirement. We nevertheless agree that there is some plausibility to the idea that a statement given in a more formal manner may be more well considered and perhaps is entitled to greater credibility. Accordingly, despite its failure to salvage the statements from a Confrontation Clause challenge, the formality of the affidavit may have lent credibility in a jury's mind. If this were a jury trial, under a reasonable doubt standard, perhaps the affidavit with its attendant formality would have significantly affected the ultimate conclusion of the trier of fact. Because the case was tried to the bench, however, we need not resolve the potential impact of the affidavit in a jury trial. We find the error harmless beyond a reasonable doubt in light of the surrounding contrary physical evidence and Amy's initial responses to Officer Mooney. *See United States v. Clark,* 559 F.2d 420, 426 (5th Cir. 1977) (citing bench trial versus trial by jury as a factor in evaluating whether error is harmless beyond a reasonable doubt).

## Conclusion

The judgment of the trial court is affirmed.

Shepard, C.J., and Dickson, Sullivan, and Rucker, JJ. concur.

**Supreme Court of the United States**
**Office of the Clerk**
**Washington, DC 20543-0001**

William K. Suter
Clerk of the Court
(202) 479-3011

October 31, 2005

Mr. Richard D. Friedman
625 South State Street
Ann Arbor, MI 48109

Re: Hershel Hammon
v. Indiana
No. 05-5705

Dear Mr. Friedman:

The Court today entered the following order in the above-entitled case:

The motion of petitioner for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. This case is to be argued in tandem with No. 05-5224, *Davis v. Washington*.

Sincerely,

/s/ William K. Suter
William K. Suter, Clerk

(3)

No. 05-5705

FILED
DEC 23 2005
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

# Supreme Court of the United States

HERSHEL HAMMON,

*Petitioner,*

v.

STATE OF INDIANA,

*Respondent.*

**On Writ Of Certiorari To The Indiana Supreme Court**

## BRIEF OF PETITIONER HERSHEL HAMMON

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## QUESTION PRESENTED

Whether an oral accusation made to an investigating officer at the scene of an alleged crime is a testimonial statement within the meaning of *Crawford v. Washington*, 541 U.S. 36 (2004).

## TABLE OF CONTENTS

TABLE OF AUTHORITIES ..... iv

OPINIONS BELOW ..... 1

JURISDICTION ..... 1

CONSTITUTIONAL PROVISION INVOLVED ..... 1

STATEMENT OF THE CASE ..... 1

SUMMARY OF ARGUMENT ..... 7

ARGUMENT ..... 9

I. AN ACCUSATION MADE TO A KNOWN POLICE OFFICER IS TESTIMONIAL WITHIN THE MEANING OF *CRAWFORD* ..... 9

A. An Accusation Made to a Known Police Officer Lies at the Core of the Concerns Underlying the Confrontation Clause ..... 10

B. As Judged by the Proper Standard – the Reasonable Expectation of a Person in the Position of the Declarant – Mrs. Hammon's Accusation was Clearly Testimonial ..... 14

II. AN ACCUSATION IS NOT EXEMPTED FROM THE CONFRONTATION CLAUSE ON THE GROUND THAT IT WAS MADE UNDER STRESS OF THE INCIDENT. ..... 21

III. THE INDIANA SUPREME COURT'S RULE INVITES MANIPULATION AND CREATES IMPROPER INCENTIVES ..... 33

A. The Indiana Supreme Court's Decision Improperly Treats Pre-Recording Oral Accusations Made at the Scene of the Alleged Crime as Not Testimonial ..... 33

B. The Indiana Supreme Court's Rule Encourages Manipulation by Police Officers and Gives Them Improper Incentives ..... 37

CONCLUSION ..... .42

## TABLE OF AUTHORITIES

### CASES

*Aveson v. Kinnaird*, 6 East 188, 102 E.R. 1258 (1805) ... 31

*Bourjaily v. United States*, 483 U.S. 171 (1987) ..... 15

*Boykin v. Alabama*, 395 U.S. 238 (1969) ..... 13

*California v. Green*, 399 U.S. 149 (1970) ..... 29, 39

*Coy v. Iowa*, 487 U.S. 1012 (1988) ..... 9, 16

*Crawford v. Washington*, 541 U.S. 36 (2004) ..... passim

*Florida v. Nixon*, 543 U.S. 175 (2004) ..... 13

*Kentucky v. Stincer*, 482 U.S. 730 (1987) ..... 41

*Maryland v. Craig*, 497 U.S. 836 (1990) ..... 9, 13

*Ohio v. Roberts*, 448 U.S. 56 (1980) ..... 19, 35, 39

*People v. King*, 121 P.3d 234 (Colo. App. 2005) ..... 22

*Portuondo v. Agard*, 529 U.S. 61 (2000) ..... 13

*R. v. Brasier*, 1 Leach 199, 168 E.R. 202 (1779) ..... 27

*R. v. Megson*, 9 Car. & P. 420, 173 E. R. 894 (1840) .... 30

*R. v. Osborne*, Car. & M. 622, 174 E. R. 662 (1842) .... 30

*R. v. Walker*, 2 M. & Rob. 212, 174 E. R. 266 (1839) .... 30

*State v. Barnes*, 854 A.2d 208 (Me. 2004) ..... 20

*State v. Lewis*, 619 S.E.2d 830 (N.C. 2005) ..... 20, 38

*State v. Mason*, 110 P.3d 245 (Wash. Ct. App. 2005) .... 20

*State v. Wright*, 701 N.W.2d 802 (Minn. 2005) ..... 20

*Tennessee v. Street*, 471 U.S. 409 (1985) ..... 29

*Thompson v. Trevanion*, Skin. 402, 90 Eng. Rep. 179, Holt 286, 90 E.R. 1057 (K.B.1693) ... 23-28, 30-32

*United States v. Brun*, 416 F.3d 703 (8th Cir. 2005) ..... 22

*United States v. Franklin*, 415 F.3d 537 (6th Cir. 2005) .. 15

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*Upton v. Commonwealth*, 2 S.E.2d 337 (Va. 1934) ..... 31

*White v. Illinois*, 502 U.S. 346 (1992) ..... 10, 22, 32, 39

**OTHER JUDICIAL AUTHORITY**

*Amendments to Rule 26(b) of the Federal Rules of Criminal Procedure*, 535 U.S. 1159 (April 29, 2002) (statement of Scalia, J.) ..... 9

## CONSTITUTIONAL PROVISIONS

Art. I, § 9 ..... 10, 11

Art. III, § 3 ..... 10

Amend. VI ..... passim

Amend. VIII ..... 10

## STATUTES AND RULES

28 U.S.C. § 1257(a) ..... 1

Indiana Code 35-42-2-1 ..... 2, 3

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Acts, ch. 25 ..... 25

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J.M. BEATTIE, CRIME AND THE COURTS IN ENGLAND, 1660-1800 (1986) ..... 16

John D. Bessler, *The Public Interest and the Unconstitutionality of Private Prosecutors*,

47 Ark. L. Rev. 511, 518-19 (1994) ..... 16-17

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CORPUS JURIS ..... 31

Deuteronomy, ch. 19 ..... 16

LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY (1993) ..... 16

Richard D. Friedman, *Confrontation and the Definition of Chutzpa*, 31 ISRAEL L. REV. 506 (1997) . 21

Richard D. Friedman, *Grappling with the Meaning of "Testimonial"*, 71 Brooklyn L. Rev. 241 (2005) ..... 18

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E. PHILLIPS, THE NEW WORLD OF WORDS (5th ed. 1696) . 25

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*Sample* Crawford *Predicate Questions*, 1 THE VOICE 8 (Nov. 2004) ..... 40

LAWRENCE H. SCHIFFMAN, SECTARIAN LAW IN THE DEAD SEA SCROLLS: COURTS, TESTIMONY AND THE PENAL CODE (1983) ..... 16

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S.C. TODD, THE SHAPE OF ATHENIAN LAW (1993). ..... 11

W. Ullmann, *Medieval Principles of Evidence*, 62 L.Q. Rev. 77 (1946) ..... 12

JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW (James H. Chadbourn rev., 1972, 1976) ..... 23, 28

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## OPINIONS BELOW

The opinion of the Indiana Supreme Court (J.A. 80-107) is published at 829 N.E.2d 444 (Ind. 2005). The opinion of the Indiana Court of Appeals (J.A. 66-79) is published at 809 N.E.2d 945 (Ind. App. 2004). The relevant order of the Miami County Circuit Court (J.A. 40) is unpublished.

## JURISDICTION

The Indiana Supreme Court issued its decision in this case on June 16, 2005. This Court has jurisdiction under 28 U.S.C. § 1257(a).

## CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him."

## STATEMENT OF THE CASE

Responding to a report of a domestic disturbance, Officers Jason Mooney and Rod Richard of the Peru, Indiana, Police Department came to the house of Petitioner Hershel Hammon and his wife Amy on the evening of February 26, 2003. No evidence indicated how much time had elapsed between the incident that led to the report and the arrival of the police officers. Mrs. Hammon was the first person the officers encountered; according to Mooney's testimony at trial, she appeared to be "timid" and "frightened." Mooney testified that he asked whether there was a "problem" or "anything was going on," and that Mrs. Hammon replied in the negative. J.A. 81.

Mooney sought and received permission from Mrs. Hammon to enter the house. There he found indications of an altercation: In the corner of the living room, the glass front of a gas heating unit was broken, with fragments of the glass on the floor and flames emerging as a result. J.A. 81. Mooney found Petitioner in the kitchen and asked what had happened.

Petitioner answered that he and Mrs. Hammon had "been in an argument" but that it "never became physical" and "everything was fine now." J.A. 81. Richard remained with Petitioner in the kitchen while Mooney went to speak with Mrs. Hammon once again. This time, according to Mooney's testimony,

> She informed me that she and Hershel had been in an argument. That he became irrate [sic] over the fact of their daughter going to a boyfriend's house. The argument became . . . physical after being verbal and she informed me that Mr. Hammon, during the verbal part of the argument was breaking things in the living room and I believe she stated he broke the phone, broke the lamp, broke the front of the heater. When it became physical he threw her down into the glass of the heater. . . .
>
> She informed me Mr. Hammon had pushed her onto the ground, had shoved her head into the broken glass of the heater and that he had punched her in the chest twice I believe.

J.A. 82.[1] Mooney then asked that Mrs. Hammon complete and sign a battery affidavit, and she did so. J.A. 82. The affidavit was on a prepared fill-in-the-blank form that Mooney apparently had with him and that tracked the language of the battery statute, IC 35-42-2-1, by alleging in general terms that the defendant "did knowingly touch" the victim "in a rude, insolent and angry manner," resulting in bodily injury to the victim. J.A. 2. In the longest blank, which contained the

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[1] Nevertheless, Officer Mooney did not notice any personal injury to Mrs. Hammon, and she did not complain that she had any pain. J.A. 26-27, 29.

instruction "Describe the Acts," Mrs. Hammon wrote the following:

> Broke our furnace and shoved me down on the floor into the broken glass and hit me in the chest and threw me down. Broke our lamps and phone. Tore up my van where I couldn't leave the house. Attacked my daughter.

J.A. 82 n.1. She then signed her name twice, once under an acknowledgment that the "investigating officer" was relying upon her allegations "as establishing Probable Cause for the arrest of the defendant on the charge of Battery under IC 35-42-2-1," and once under an affirmation that the representations in the affidavit were true, that she understood the provisions of the "false informing statute," and that she was reporting a crime. J.A. 2-3.

The State charged Petitioner with Domestic Battery, a Class A misdemeanor. On May 9, 2003, the Circuit Court of Miami County held a bench trial on this charge, consolidated with a hearing on an allegation that the incident violated the terms of Petitioner's probation on an earlier battery conviction. Mrs. Hammon was not present at the consolidated proceeding. Although the state had subpoenaed her, it never made any attempt to show that she was unavailable for trial. Over Petitioner's objections, the court admitted both Officer Mooney's testimony reporting Mrs. Hammon's oral statements and Mrs. Hammon's affidavit. The court rejected hearsay objections on the grounds that the oral statement fit within the excited utterance exception to the hearsay rule and that the affidavit was a present sense impression. The only other evidence was brief testimony by the secretary of the county probation department establishing Petitioner's probation status. Petitioner offered no evidence.

The trial court convicted Petitioner of Domestic Battery and also found that he had violated the terms of his probation. The court sentenced Petitioner to a prison term of one year, with all but twenty days suspended. It also instructed him to complete a drug and alcohol evaluation and a counseling program.

Petitioner took an appeal to the Indiana Court of Appeals, which upheld the conviction. The appellate court agreed with the trial court that Mrs. Hammon's oral statement was an excited utterance. While the appeal was pending, this Court decided *Crawford v. Washington*, 541 U.S. 36 (2004). Under *Crawford*, if the statement was testimonial in nature, it could have been admitted against Petitioner only if he had an opportunity to cross-examine Mrs. Hammon *and* she were shown to be unavailable, but neither of these conditions was true. Accordingly, the court of appeals considered whether the oral statement was testimonial within the meaning of *Crawford*. The court held, however, that the statement was not testimonial, and it concluded that admission of the statement did not violate Petitioner's rights under the Confrontation Clause. The court did not reach the question of whether admission of the affidavit was erroneous, because it concluded that the affidavit was "cumulative" of the report of Mrs. Hammon's oral statement, so any error in admitting the affidavit was harmless. In reaching the conclusion that Mrs. Hammon's oral statement was not testimonial, the court emphasized that the statement lacked a formal quality and that the statement was not, in its view, made in response to interrogation.

The Indiana Supreme Court granted a petition for transfer, *Hammon v. State*, 2004 Ind. LEXIS 1031 (Ind. Dec. 9, 2004), but it too upheld the conviction. While recognizing that it was "unclear precisely how much time had passed between the event and the statement," the court agreed with the lower courts that Mrs. Hammon's statement was excepted from the rule

against hearsay as an excited utterance under Indiana Rule of Evidence 803(2). The court then turned to the Confrontation Clause issue, focusing on the meaning of the term "testimonial." After reviewing the decisions of the court of appeals in this case and of courts from other jurisdictions, the supreme court distanced itself from the court of appeals' analysis but nevertheless concluded that

> a "testimonial" statement is one given or taken in significant part for purposes of preserving it for potential future use in legal proceedings. In evaluating whether a statement is for purposes of future legal utility, the motive of the questioner, more than that of the declarant, is determinative, but if either be principally motivated by a desire to preserve the statement it is sufficient to render the statement "testimonial." If the statement is taken pursuant to established procedures, either the subjective motiva-tion of the individual taking the statement or the ob-jectively evaluated purpose of the procedure is sufficient.

J.A. 100-01.

Focusing on *Crawford*'s reference to statements made in "police interrogations," the supreme court drew the inference that such an interrogation "is properly limited to attempts by police to pin down and preserve statements rather than efforts directed to determining whether an offense has occurred, protection of victims or others, or apprehension of a suspect." Thus, "responses to initial inquiries by officers arriving at a scene are typically not testimonial." J.A. 102.

Turning to the facts of the case before it, the supreme court asserted that "the motivations of the questioner and declarant are the central concerns." Though it noted the absence of findings on point, the court then concluded that what

it characterized as "the initial exchange between Mooney and Amy"

> fell into the category of preliminary investigation in which the officer was essentially attempting to determine whether anything requiring police action had occurred and, if so, what. Officer Mooney, responding to a reported emergency, was principally in the process of accomplishing the preliminary tasks of securing and assessing the scene. Amy's motivation was to convey basic facts and there is no suggestion that Amy wanted her initial responses to be preserved or otherwise used against her husband at trial.

J.A. 104. Thus, the court held that Mrs. Hammon's oral statements were not testimonial, and there was no error in admitting them.

The court also held that admission of the affidavit violated Petitioner's confrontation right. It indicated that if the case had been tried to a jury the error may not have been harmless, despite the fact that the affidavit "merely repeated the substance of Amy's statements to Officer Mooney," because "the formality of the affidavit may have lent credibility in a jury's mind." But, given that the case was tried to the bench, the court concluded that the error was harmless. J.A. 106. Accordingly, Petitioner's conviction was affirmed. Petitioner then petitioned this Court for a writ of *certiorari*, and the Court granted the writ.

## SUMMARY OF ARGUMENT

The Court can decide this case by adopting a simple principle: A statement made to a known police officer (or other government agent with significant law enforcement responsibilities) and accusing another person of a crime is testimonial within the meaning of *Crawford*.

The Confrontation Clause is an affirmative guarantee that testimony introduced against an accused must be given under a prescribed procedure – in the presence of the accused and subject to cross-examination. The determination of whether a statement is testimonial in nature therefore depends not on whether the statement has the *characteristics* of trial testimony but on whether the statement fulfills the *function* of testimony. As suggested by the frequently used locution "to confront one's accusers," an accusation made to a known police officer lies at the core of that function. Indeed, if such an accusation is allowed as proof at trial, then our system has countenanced a method of testifying that is radically different from the one constitutionally prescribed.

In assessing whether a statement is testimonial, the critical perspective is not that of the questioner, if there even is a questioner, but that of the speaker, the person who made the statement and whom the accused assertedly has a right to confront. The best standard is whether a reasonable person in the position of the declarant would anticipate use of the statement in investigation or prosecution of a crime. Under this standard, an accusation made to a known police officer is clearly testimonial.

The decision of the Indiana Supreme Court cannot be saved by a doctrine allowing otherwise inadmissible statements because of the proximity of time to the incident at issue or the stress under which the speaker made the statement. There was no such doctrine at the time of the Framing, and it was not

established as a matter of common law until many years afterward.

Finally, the decision of the Indiana Supreme Court invites manipulation and creates inappropriate incentives. Without saying so, the decision amounts to a virtually *per se* rule that an oral accusation made to an officer at the scene before any writing or other recording has been made is *not* testimonial. In the court's view, the critical question was whether, in receiving Mrs. Hammon's oral accusation, Officer Mooney was engaged in "the preliminary tasks of securing and assessing the scene." The vulnerability of this standard to manipulation is demonstrated by the way the court applied it in this case. The officer procured the oral accusation at least in substantial part as a step in the process of gathering proof for prosecution. He did not need the accusation to secure the scene, and he did not use it for that purpose. And if he is deemed to have taken the accusation for purposes of assessing the scene, then that characterization will always be possible – until an accusation is made.

The decision of the Indiana Supreme Court gives an investigating officer an incentive to delay securing the scene, and to delay the appearance of the scene being secured, so that oral accusations made at the scene may be introduced at trial if the accuser does not testify subject to cross-examination. It also gives the officer an incentive to avoid questions that might be deemed to be interrogation, even if that would be the most effective method of learning useful information. The accusation made at the scene of the incident in this case is no less testimonial than the station-house statement made in *Crawford*, and using it to convict the Petitioner without affording him an opportunity for confrontation violates the Constitution.

## ARGUMENT

### I. AN ACCUSATION MADE TO A KNOWN POLICE OFFICER IS TESTIMONIAL WITHIN THE MEANING OF *CRAWFORD*.

The Confrontation Clause imposes three basic conditions on testimony offered against an accused: First, it must be given in the presence of the accused. *Coy v. Iowa*, 487 U.S. 1012, 1016 (1988).[2] Second, the accused must have an opportunity to cross-examine the witness. *Crawford v. Washington*, 541 U.S. 36, 53-54 (2004). Third, the witness must give the testimony at trial unless she is unable to testify there. *Id.*

Amy Hammon made a statement to Officer Mooney accusing Petitioner of a crime. This statement satisfied *none* of the conditions stated above. Petitioner was not present when the accusation was made, nor did he ever have an opportunity to cross-examine Mrs. Hammon, nor did she testify at trial, nor was her unavailability to testify at trial demonstrated.[3] If the accusation is deemed to be testimonial, therefore, its use at trial

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[2] The question of when or whether this aspect of the right can be satisfied when the witness and the accused are in different rooms but connected electronically, *cf.* Maryland v. Craig, 497 U.S. 836 (1990); Amendments to Rule 26(b) of the Federal Rules of Criminal Procedure, 535 U.S. 1159 (April 29, 2002) (statement of Scalia, J.) (explaining Court's decision not to transmit to Congress proposed amendment that would allow testimony from a remote location in some instances), is not raised by this case.

[3] A further condition of testimony is that it be sworn. *See Crawford*, 541 U.S. at 52 n.3. This condition, too, may be protected by the Confrontation Clause; cross-examination would lose considerable bite were the witness not subject to the penalties of perjury. Mrs. Hammon's affidavit was made subject to those penalties. J.A. 2-3. Her oral accusation, the one that provided the basis for Petitioner's conviction, was not.

– which was essential to Petitioner's conviction – violated Petitioner's rights under the Confrontation Clause as elucidated in *Crawford*.

To decide this case, then, the Court need go no further than to adopt a simple principle: A statement made to a known police officer (or other government agent with significant law enforcement responsibilities) and accusing another person of a crime is testimonial within the meaning of *Crawford*. *See Crawford*, 541 U.S. at 58 n.8 (treating the statements involved in *White v. Illinois*, 502 U.S. 346 (1992) – accusations made by a child victim to an investigating police officer – as testimonial and doubting that spontaneity could justify their admission).

These conditions are sufficient, but not necessary, for a statement to be testimonial. Decision of this case does not require a determination of other sets of conditions in which a statement should be deemed testimonial.

**A. An Accusation Made to a Known Police Officer Lies at the Core of the Concerns Underlying the Confrontation Clause.**

The Confrontation Clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." Unlike some clauses of the Constitution,[4] this one does not merely prohibit a given procedure. Rather, like the rest of the Sixth Amendment,[5] it provides an affirmative guarantee of the

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[4] *See* U.S. Const. art. I, § 9, cl. 3 (ex post facto and Bill of Attainder clauses); art. III, § 3, cl. 2; (Attainder of Treason clause); amend. V (Self-Incrimination clause); amend. VIII (prohibition of excessive bail and fines and cruel and unusual punishments).

[5] U.S. Const. amend. VI (providing that "in all criminal

procedure described. Witnesses against the accused must give their testimony subject to confrontation by the accused – in his presence, subject to an opportunity for cross-examination, and at trial if reasonably possible. Assuming the accused has not waived or forfeited the right, no other way of giving testimony is permissible. Thus, the Clause would be violated if a prosecution witness gave her testimony according to the civil-law tradition, by examination in private by judicial officers. *Crawford*, 541 U.S. at 43. And if an adjudicative system allowed a prosecution witness to give her testimony by writing it and placing it in a pot sealed until the time of trial, according to the later Athenian tradition,[6] or by relating it to a friend whom she designated to transmit it to court, the violation would be just as clear.[7]

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prosecutions, the accused shall enjoy" various rights, including, in addition to confrontation, the rights to speedy and public trial, by a jury of the district in which the crime was committed, to compulsory process and to assistance of counsel); *see also* art. III, § 3, cl. 1 (requiring "Testimony of two Witnesses" for proof of treason).

[6] S.C. TODD, THE SHAPE OF ATHENIAN LAW 128-29 (1993).

[7] The Court's statement in *Crawford* that "the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused," 541 U.S. at 50, should be understood in this light. As the Court amply documents in *Crawford*, "the civil-law mode" was the most salient alternative to the common-law model of testimony, and it was the one that had been used to oppressive effect both in England and in America. But this does not mean that the Confrontation Clause meant to allow judicial systems to provide any mode of testimony so long as it did not resemble that of the civil law. Indeed, the civil-law system, while not the one adopted by the common law, was the one adopted by the great civilizations of continental Europe, and it included some important protections, such as the oath and cross-examination on written

It follows that, in determining whether a statement is testimonial within the meaning of *Crawford* – or, put another way, whether the speaker is acting as a witness for purposes of the Confrontation Clause – it is not necessary that the statement have been made under conditions bearing any resemblance at all to those of a common-law trial. The whole point of the Confrontation Clause, as demonstrated by the historical discussion in *Crawford*, 541 U.S. at 42-56, is to *ensure* that testimony be given at trial or, if necessary, at some other formal proceeding at which the accused is present and can cross-examine. The determination of whether a statement is testimonial cannot depend, therefore, on the extent to which it shares the *characteristics* of trial testimony. (If it did, those who make and receive statements in anticipation of prosecution would have a clear incentive to avoid those characteristics.) Rather, the critical consideration is whether, assuming statements of its kind are admissible, a system will have been created in which witnesses may testify against an accused in some way other than the one required in a common-law trial, subject to confrontation of the accused. And this determination will depend, whatever the circumstances in which the statement was made, on whether the statement performs the *function* of testimony.

The present case does not demand a detailed or precise exegesis of what that function is. A serviceable, shorthand,

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questions. R.C. van Caenegem, *History of European Civil Procedure, in* 16 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW 19 (Mauro Cappelletti ed., c. 1972); W. Ullmann, *Medieval Principles of Evidence*, 62 L.Q. REV. 77, 84-85 (1946). A system that offered *fewer* protections would not stand in *better* position under the Confrontation Clause. *Cf. Crawford*, 541 U.S. at 52 n.3 ("We find it implausible that a provision which concededly condemned trial by sworn *ex parte* affidavit thought trial by *unsworn ex parte* affidavit perfectly OK.").

standard is that a statement performs the function of testimony, and the speaker acts as a witness, if the statement transmits information for use in investigation or prosecution of crime. However the function may be described, it appears plain that an accusation made to a known police officer lies at the heart of it.

Indeed, it is hard to imagine a statement more testimonial in nature, or one that, if admitted against the person accused without an opportunity for confrontation, more clearly violates the Confrontation Clause. Accusations are so much the core of the Clause's concern that this Court has often referred to "the right to confront one's accusers,"[8] sometimes explicitly associating that locution – rather than the actual term "the witnesses against him" – with the Sixth Amendment.[9] An accusation does not provide merely peripheral or supporting information for a prosecution. Rather, it is an assertion that a person has committed a crime and, in a case like this one, a description of the circumstances and nature of the crime. When it asserts all the elements of the crime – as in this case – it may be sufficient in itself to support conviction.

Furthermore, the audience for such an accusation makes it about as far from being a "casual remark to an acquaintance," *Crawford*, 541 U.S. at 51, as possible. The accusation is made directly to a law enforcement officer, whose responsibility it is

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[8] *E.g.*, Florida v. Nixon, 543 U.S. 175, 185 (2004); *Crawford*, 541 U.S. at 43 ("The right to confront one's accusers is a concept that dates back to Roman times."); Boykin v. Alabama, 395 U.S. 238, 243 (1969).

[9] *E.g.*, United States v. Ruiz, 536 U.S. 622, 629 (2002); ("the Sixth Amendment right to confront one's accusers"); Portuondo v. Agard, 529 U.S. 61, 64 (2000) ("Sixth Amendment rights to be present at trial and confront his accusers"); Maryland v. Craig 497 U.S. 836, 849-50 (1990) ("the Sixth Amendment's guarantee of the right to confront one's accusers").

to make an arrest, if he deems it appropriate, to transmit material information to the prosecutor, and, if the occasion arises and he is allowed to do so, to testify in court about the information he has received.

In short, if an accusation made to a police officer, whatever the circumstances in which it was made, may be admitted against an accused without an opportunity for confrontation, then virtually the whole of the confrontation right is lost: Rather than saying that a prosecution witness must testify in the presence of the accused and subject to cross-examination, as the Confrontation Clause requires, we must add a qualifier, that the witness may also testify by making an accusation to a police officer.

**B. As Judged by the Proper Standard – the Reasonable Expectation of a Person in the Position of the Declarant – Mrs. Hammon's Accusation was Clearly Testimonial.**

In determining whether Mrs. Hammon's accusation was testimonial, the Indiana Supreme Court explicitly put primary weight on the motivation of the questioner. J.A. 100. But whether a statement is testimonial should be determined from the perspective of the declarant. The decisive consideration is the reasonable anticipation of a person in the declarant's position.

Though the Indiana Supreme Court indicated that it would be *sufficient* to render a statement testimonial that the questioner was "principally motivated by a desire to preserve the statement" for "potential future use in legal proceedings," J.A. 100, this principle is untenable. It would extend the confrontation right *too* far; indeed, it would require a major change in police investigative practices. Suppose a conspirator makes a statement in support of the conspiracy to an undercover police officer or a confidential informant, who surreptitiously records the statement for evidentiary purposes. Admission of

such a statement against another member of the conspiracy has never been considered to violate the confrontation right.[10] Nor should it be: The police officer may be trying to secure evidence from the declarant, as police secure evidence from many sources, non-human as well as human, but that does not make the process testimonial.

More significantly for this case, a questioner's motivation to preserve a statement for potential evidentiary use cannot be *necessary* to render the statement testimonial. Several considerations support this conclusion.

First, declining to characterize a statement as testimonial unless a questioner took the statement for potential use in legal proceedings would lead to absurd and intolerable results. Suppose Mrs. Hammon had gone to the police station on her own initiative and said, "Here is an affidavit relating a battery committed on me by my husband. I hope you will use it to help convict him of the crime." Clearly, this is testimonial even though there was no questioner at all.[11]

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[10] *See Crawford*, 541 U.S. at 58 (citing with approval, as among the Court's cases that, "in their outcomes, hew closely to the traditional line," *Bourjaily v. United States*, 483 U.S. 171 (1987), which "admitted statements made unwittingly to a Federal Bureau of Investigation informant"); United States v. Saget, 377 F.3d 223, 229-30 (2d Cir. 2004) (concluding "that a declarant's statements to a confidential informant, whose true status is unknown to the declarant, do not constitute testimony within the meaning of *Crawford*."); *but cf.* United States v. Franklin, 415 F.3d 537 (6th Cir. 2005) (citing as supporting admissibility the fact that the recipient of the statement "was not a police officer or a government informant seeking to elicit the statements to further a prosecution").

[11] The same conclusion would hold if she made her accusation in the form of a letter or a videotape that she gave to an intermediary whom she asked to relay the accusation to the police.

Second, making the role of the questioner decisive ignores the fundamental nature of the accused's right, which is to be confronted with the *witnesses* against him. The existence of police officers and public prosecutors is not essential to the existence of the confrontation right. Indeed, the right to confront adverse witnesses predates the institutions of police forces and public prosecutors by more than two millennia.[12] Even at the time the Confrontation Clause incorporated the right into the Constitution, there was nothing resembling the modern police force,[13] and both in England and in parts of America most crime was still privately prosecuted.[14]

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[12] Deuteronomy 19:15-18 (providing that if a witness makes an accusation of wrongdoing, "then both parties to the dispute shall appear before the Lord, before the priests and the judges who are in office in those days; the judges shall inquire diligently"); Acts 25:16 ("It is not the manner of the Romans to deliver any man up to die before the accused has met his accusers face to face, and has been given a chance to defend himself against the charges."), *quoted in* Coy v. Iowa, 487 U.S. 1012, 1015-16 (1988); LAWRENCE H. SCHIFFMAN, SECTARIAN LAW IN THE DEAD SEA SCROLLS: COURTS, TESTIMONY AND THE PENAL CODE 73 (1983) (quoting Dead Sea Scroll on procedure in case only one person witnesses a capital offense; witness must report crime to examiner in presence of accused, and testimony is recorded, allowing for accumulation of testimony across episodes to satisfy three-witness requirement).

[13] LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 67 (1993) (describing the rise of the modern police force as one of the "major social inventions" of the nineteenth century).

[14] J.M. BEATTIE, CRIME AND THE COURTS IN ENGLAND, 1660-1800, at 35-36 (1986), *quoted in* Richard D. Friedman & Bridget McCormack, *Dial-In Testimony*, 150 U. PA. L. REV. 1171, 1248 n.295 (2002); John D. Bessler, *The Public Interest and the Unconstitutionality of Private Prosecutors*, 47 ARK. L. REV. 511,

Third, it is not the police or prosecutors or other questioners who violate the confrontation right. There is nothing wrong with police officers or prosecutors taking statements privately, without offering the accused a chance to be confronted by the witness. Good investigation often demands that they do so, as they did both in *Crawford* and in this case. The Clause is violated only when a court admits the statement in support of a prosecution without the accused having an opportunity to confront the witness. That the statement in question was made to a government officer who was openly attempting to gather evidence for use in a prosecution may be a significant factor supporting the conclusion that the statement is testimonial; that was so in *Crawford* and it is so in this case as well.[15] But for a statement to be deemed testimonial, it is not essential that it be received by a government officer, or that such an officer be motivated by a desire to record evidence for purposes of prosecution.

The critical perspective, therefore, is not that of the questioner, if there even is a questioner, but that of the speaker, the person who made the statement and whom the accused assertedly has a right to confront. The Indiana Supreme Court did purport to consider Mrs. Hammon's motivation as well as that of Officer Mooney, but it did so in such a dismissive way, without any genuine examination of the evidence bearing on the

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518-19 (1994).

[15] It is true, as *Crawford* said, that "[i]nvolvement of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse . . . ." 541 U.S. at 56 n.7. The abuse by prosecutors consists not in taking the statements privately but in taking advantage of such leeway as the courts allow them to introduce privately given testimony in evidence at trial without affording the accused the benefit of confrontation.

question,[16] that her motivation cannot have played a substantial role in the court's decision.

Furthermore, the court erred by posing the issue in terms of Mrs. Hammon's *motivation*. Instead, the question should be whether a reasonable person in the position of the declarant would *anticipate* use of the statement in investigation or prosecution of a crime. Many different motivations may impel a witness to make a testimonial statement: She may be responding to pressure, believing that her own status in the criminal justice system or other interests of hers (such as her ability to maintain custody of her children) are dependent on her making an accusation to the authorities.[17] In some such cases, she might hope that the statement will never be used against the person she has accused. Or she might make the statement for purposes of personal expiation, or catharsis, or to secure her immediate personal safety.[18] In none of these cases does the actual motive of the declarant – or combination of motives, because of course several may have operated at once – diminish the testimonial nature of the statement: Whatever her inner motivations may have been, she has knowingly created evidence that a reasonable person understands will likely be used by the criminal justice system. The jurisprudence of the Confrontation Clause should recognize that such self-conscious creation of evidence is testimonial without the need to flail about in the dark in an attempt to understand the psyche of a speaker who is not even testifying in court.

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[16] See *infra* note 48.

[17] Petitioner has asserted that the police threatened to take the couple's children away if Mrs. Hammon did not sign an accusatory statement. J.A. 59.

[18] *See* Richard D. Friedman, *Grappling with the Meaning of "Testimonial"*, 71 BROOKLYN L. REV. 241, 253 (2005).

Furthermore, focusing on reasonable anticipation rather than on motivation allows for straightforward adoption of an objective test: It makes perfect sense to ask, "What would a reasonable person have anticipated in these circumstances?" But the question, "If a reasonable person made this statement in these circumstances, what would her motivation have been?" is conceptually very difficult, if not incoherent. Even if applied on a case-by-case basis, an objective test is easier to implement than a subjective one, which requires an inquiry into the particular speaker's mind. Moreover, unlike a subjective test, which necessarily depends on the circumstances of each particular case, an objective test lends itself to the development of categorical rules addressing defined portions of the confrontation landscape. Such rules further simplify implementation of the right, and they protect it against erosion. The greatest value of establishing rights of an accused in the Constitution, subject to review by one Supreme Court, lies in the fact that courts that are responsible for the actual implementation of criminal procedure will often be tempted in adjudicating particular cases to disregard those rights or minimize their value. Broad, general tests are of limited utility in counteracting this factor; brief as the history is under *Crawford*, it is enough to show that some courts are inclined to manipulate the meaning of "testimonial" to admit evidence about as much as they manipulated the meaning of "reliable" for the same purpose under the prior regime of *Ohio v. Roberts*, 448 U.S. 56 (1980);[19] some of the post-*Crawford* decisions – often applying complex, multi-part tests just as the state

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[19] *Crawford*, 541 U.S. at 63-64 (discussing how manipulation of reliability standard made it "so unpredictable that it fail[ed] to provide meaningful protection from even core confrontation violations"). Similarly, beginning decades before *Roberts*, some courts and commentators manipulated the boundaries of the hearsay exception for excited utterances. *See infra* p. 32.

supreme court in *Crawford* did – are quite startling in this respect.[20]

The Court can decide this case by staying on the prudent path on which it started two terms ago. *Crawford* identified several categories of statement that are necessarily testimonial – "prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and [statements made in response to] police interrogations," 541 U.S. at 68. In this case, the Court merely needs to add "accusations made to known police officers" to that list. Such accusations – asserting that another person has committed a crime, and made to an officer responsible for

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[20] *See, e.g.*, State v. Barnes, 854 A.2d 208, 210-12 (Me. 2004) (victim's "statements to the police when she *reported a crime*," made after driving herself to the station-house, were not testimonial because she initiated the encounter, "she was still under the stress of the alleged assault," and her statements were not in response to "tactically structured police questioning") (emphasis added); State v. Wright, 701 N.W.2d 802, 813-14 (Minn. 2005) (victim's responses to police questioning about half an hour after the alleged incident were not testimonial because police were merely "determin[ing] what happened," although they already had the suspect in custody and the officers took notes later used to refresh their memories at trial); State v. Lewis, 619 S.E.2d 830, 844 (N.C. 2005) (reasons for holding accusation non-testimonial include: questioner was a field officer, not a detective; focus of the questioning was "to gather as much preliminary information as possible about the alleged incident," officer not yet being certain of seriousness of crime; accuser did not initiate conversation; officer was not only other person present; accuser "did not know the status of the investigation"); State v. Mason, 110 P.3d 245, 246, 249-51 (Wash. Ct. App. 2005) (victim's statements made the day after an attack to "report the crime" were not testimonial – despite the fact that the victim was questioned at two separate police stations by several officers – because he was seeking protection).

initiating the machinery of criminal justice – lie at the core of the concern of the Confrontation Clause.

## II. AN ACCUSATION IS NOT EXEMPTED FROM THE CONFRONTATION CLAUSE ON THE GROUND THAT IT WAS MADE UNDER STRESS OF THE INCIDENT.

If, as Part I has argued, there is a categorical rule that accusatory statements to police officers are testimonial, then the State cannot prevail unless it brings the case within an exception to that rule. But none applies.[21]

The Indiana Supreme Court held that Mrs. Hammon's accusation came within the State's hearsay exception for "excited utterances," Indiana Evidence Rule 803(2). Because Indiana does not have a residual exception to the hearsay rule, the court noted, the "excited utterance" exception "has been interpreted broadly to permit admission of statements deemed trustworthy." J.A. 85. While noting that "[i]t is unclear precisely how much time had passed between the event and the statement," the court held that "a prompt police response was a reasonable inference from this record." J.A. 86-87; the court

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[21] *Crawford* left open the possibility that there is a "dying declaration" exception to the confrontation right, 541 U.S. at 56 n.6. Even if so, plainly it does not apply. Counsel has argued in academic writing that the reason the Confrontation Clause poses no obstacle to some dying declarations accusing the defendant of homicide is not that such declarations fit within an exception to the rule against hearsay but that the defendant has forfeited the confrontation right. *See generally* Richard D. Friedman, *Confrontation and the Definition of Chutzpa*, 31 ISRAEL L. REV. 506 (1997). *Crawford* also explicitly preserves forfeiture doctrine. 541 U.S. at 62. But the State has never claimed that Petitioner forfeited the right, as by intimidating Mrs. Hammon, and there is no basis for doing so; indeed, she specifically stated that she did not feel threatened by Petitioner. J.A. 64-65.

failed even to speculate, however, as to how much time may have passed between the event and the domestic disturbance report that generated the police response.

Indiana is free to make its own hearsay rules, of course, but the decision contains a strong suggestion that characterizing the statement as an excited utterance has constitutional significance. This may explain the court's cursory dismissal of the speaker's perspective. J.A. 95 ("The Court of Appeals is likely correct that the declarant of an excited utterance will ordinarily lack the requisite motive because the heat of the moment makes it unlikely that the declarant is focusing on preservation rather than communication of information.") But the suggestion is incorrect. There is no "excited utterance" exception to the Confrontation Clause, nor does the excited state of the speaker render a statement non-testimonial for purposes of the Clause. And even if there were such a doctrine, it would not come close to fitting this case.

These points are clear from *Crawford*, from a footnote *not even cited* by the Indiana Supreme Court.[22] Treating the accusatory statements in *White v. Illinois*, 502 U.S. 346 (1992), as testimonial, the note then addressed the issue of whether characterizing the statements as "spontaneous declarations" could justify the absence of cross-examination. The Court said:

> It is questionable whether testimonial statements would ever have been admissible on that ground [as "spontaneous declarations"] in 1791; to the extent the hearsay exception for spontaneous declarations

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[22] Other courts as well, among those reaching similar results, have disregarded the footnote, presumably because otherwise they would have to follow its clear implication. *E.g.*, United States v. Brun, 416 F.3d 703 (8th Cir. 2005); People v. King, 121 P.3d 234 (Colo. App. 2005).

> existed at all, it required that the statements be made "immediat[ely] upon the hurt received, and before [the declarant] had time to devise or contrive any thing for her own advantage." *Thompson* v. *Trevanion*, Skin. 402, 90 Eng. Rep. 179 (K.B.1694).

541 U.S. at 58 n.8.[23]

We may now go beyond this statement, because it is clear that as of 1791 there was no doctrine allowing admissibility of otherwise inadmissible statements on the ground that they were spontaneous declarations or excited utterances. Such a doctrine did not develop until many years later.[24]

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[23] *Thompson* is reported as having been decided in Michaelmas term, 5 Wm. & Mary, which was 1693, EDWARD ALEXANDER FRY, ALMANACKS FOR STUDENTS OF ENGLISH HISTORY 126, 137 (1915), as indicated by Wigmore, 6 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1747, at 196, § 1749, at 200 (James H. Chadbourn rev., 1976), rather than 1694; this is the *only* respect in which Wigmore is better authority than *Crawford*.

[24] In a review of hearsay law from 1754 to 1824, Professor Thomas Gallanis writes,

> [T]he treatises indicate that most of the modern exceptions to the rule against hearsay were in place by the end of the eighteenth century, even if their contours in particular cases required clarification. These exceptions were: legitimacy, family relationships, pedigree, prescription, custom, general reputation, prior consistent and inconsistent statements, and dying declarations.

T.P. Gallanis, *The Rise of Modern Evidence Law*, 84 IOWA L. REV. 499, 533 (1999) (footnotes omitted). Conspicuously absent from this list, of course, is an exception for excited utterances.

First, note that *Thompson* was a civil case.[25] It therefore has little or no relevance to the confrontation right.

Second, *Thompson* appears never to have been cited by another judge or court – not once – until 1805, and then in another civil case. It was reported in 1728, Skinner 402, 90 E.R. 179, the report was repeated in virtually identical form in a compilation of decisions by the judge, Sir John Holt, published ten years later, Holt 286, 90 E.R. 1057, and then the case seems to have escaped judicial mention for nearly seventy years.

Third, *Thompson*, a brief decision by a single judge, never even mentions the contents of the statement, its audience, or the purpose for which it was offered at trial. Was the statement one that, timing aside, should be considered testimonial? Was it offered to prove the truth of what it asserted, which would violate the confrontation right if it was testimonial in nature and was offered against the accused in a criminal case, or was it relevant as part of the story being proven, *res gestae* in the term that later became accepted? We can only speculate on these matters. Because *Thompson* was so cryptic, later courts and commentators did not know what to make of it; they cited it for a wide variety of propositions, but not until the latter part of the nineteenth century was it thought to provide good support for the proposition that an accusation made shortly after an event

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[25] The caption names private parties first rather than the Crown, describes the case as an "action" rather than arising by indictment, and states that it was heard at *nisi prius*, which (except in a removal case, which *Thompson* was not) is a forum for civil litigation. *See* J.S. COCKBURN, A HISTORY OF ENGLISH ASSIZES 1558-1714 134 (1972); 1 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 279 (7th ed. 1956).

might be introduced, absent trial testimony by the speaker, as an accurate narrative.[26]

Fourth, *Thompson* speaks in terms of immediacy. In 1693 and in 1791, immediate meant what it does today – one event follows another immediately if nothing occurs in between.[27]

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[26] For an early sign of confusion see 2 MATTHEW BACON, A NEW ABRIDGEMENT OF THE LAW 313 (1st ed. London 1736) (citing *Thompson* by citation for a general paragraph saying: "It seems agreed, that what another has been heard to say is no Evidence, because the Party was not on Oath; also, because the Party, who is affected thereby, had not an Opportunity of Cross-examining; but such Speeches or Discourses may be made use of by Way of Inducement or Illustration of what is properly Evidence.").

The proposition for which *Thompson* is cited in the annotations published with Gilbert's treatise, GEOFFREY GILBERT, THE LAW OF EVIDENCE 108 (1754) ("But tho' Hearsay be not allow'd as direct Evidence, yet it may be in Corroboration of a Witness Testimony to shew that he affirmed the same thing before on other Occasions, and that the Witness is still consistent with himself; for such Evidence is only in Support of the Witness that gives in his Testimony upon Oath."), is inapposite to the case; the declarant presumably did not testify at trial because she was a party in a civil case and so was disqualified.

One of the leading treatises of the first part of the nineteenth century treated *Thompson* as standing only for the proposition that "the fact of making the complaint immediately . . . is admissible in evidence." 1 THOMAS STARKIE, A PRACTICAL TREATISE ON THE LAW OF EVIDENCE 161 (5th ed. 1834).

[27] J. BULLOKAR, AN ENGLISH EXPOSITOR (8th ed. 1688) ("That which cometh directly from one thing to another without any thing between."); E. PHILLIPS, THE NEW WORLD OF WORDS (5th ed. 1696) ("next, and presently following"); SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (5th ed. 1773) ("Being in such a state with respect to something else as that there is nothing between them."); N. BAILEY, AN UNIVERSAL ETYMOLOGICAL ENGLISH

And if, as *Thompson* suggests, the rationale is that the speaker has no time to create a self-serving falsehood, then the permissible time frame is indeed instantaneous, because in many situations such creation takes no more than an instant.[28] Immediacy does not remotely resemble the present case.

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DICTIONARY (25th ed. 1783) ("which follows without any thing coming between."); THOMAS SHERIDAN, A COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (6th ed. 1796) ("instant; present with regard to time.").

[28] Consider this episode related by an experienced Evidence teacher:

> My wife and I had decided to remodel the den in our home and I . . . decided to refrain from sharing that fact with two of our sons, Nathan, then age 3, and Chris, age 4. On the day work was to begin, I took them off to daycare. During the day, we ripped out the carpet in the room, tore out the bookcases, stripped off the wallpaper, knocked out the walls of a closet, and generally reduced the room to a bare shell. At the end of the day, I picked up Nathan and Chris at daycare, took them home, and led them by the hand into the now-demolished room. They stood there, beholding the wreckage, eyes wide and mouths agape, clearly in the stress of excitement caused by the event. And in that moment, Nathan turned to me and said, "Chris did it."

Peter B. Knapp, *Excited Utterances in the Real World: What My Children Have Taught Me About Reliability*, *available at* http://www.wmitchell.edu/academics/faculty/knapp3.asp. *See also* Stanley A. Goldman, *Distorted Vision: Spontaneous Exclamations as a "Firmly Rooted" Exception to the Hearsay Rule*, 23 LOY. L.A. L. REV. 453, 460 (1990) ("Commentators cite to psychological studies indicating that the interval which separates cognition from the onset of the capacity to fabricate is brief – often a matter of fractions of seconds – and impossible to gauge without the aid of instruments.").

Between the alleged incident and Mrs. Hammon's accusation, there passed not only an unknown amount of time but also two attempts by the police to secure a statement from her. Indeed, it is clear that there was more than ample time to falsify because *on the State's own theory* Mrs. Hammon did just that *well before* making her accusation: Her first statement to Officer Mooney, inconsistent with the later accusation, denied that there was a problem.

In contrast to *Thompson*, note the well-known case of *R. v. Brasier*, 1 Leach 199, 168 E.R. 202 (1779). There, a young girl, under seven years of age, "immediately on her coming home" told her mother and a woman who lodged with her of a sexual assault by the accused. The two women testified at trial, but the girl "was not sworn or produced as a witness on the trial." After Brasier was convicted, the judge referred the matter to the Twelve Judges, who decided unanimously that the two women should not have been allowed to recount what the girl had told them. Strikingly, and explicitly, the judges referred to the girl's statement as testimony. They held that "no testimony whatever can be legally received except upon oath." Even very young children could take the oath if they had sufficient knowledge of its nature and consequences, but if found incompetent "their testimony cannot be received."

The manifest premise of the judges' discussion was that if the speaker had been an adult it would have been plainly improper for other persons to relay her accusations – her "testimony" – to court; the only question, answered in the negative, was whether the youth of the speaker made a difference. *Brasier* clearly reflects the law of its time,[29] and it

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[29] The case was soon picked up by treatises. *See, e.g.*, FRANCIS BULLER, AN INTRODUCTION TO THE LAW RELATIVE TO TRIALS AT NISI PRIUS 293 (5th ed. 1790), and it continues to be good law with respect to the competence of child witnesses. JOHN E.B. MYERS,

held squarely against admissibility notwithstanding the presence of several factors, absent in the present case, that might have been argued to point the other way – the demonstration of immediacy, and the facts that the speaker was a child, that her audience was not government officials, and that she was not responding to questioning.

Thus, at the time of the Framing, there was no special rule allowing admissibility of accusatorial statements because they were made under stress of excitement. There were two situations in which such statements might be admitted. *First*, as *Crawford* noted, there was a well-established doctrine admitting certain dying declarations. 541 U.S. at 56 n.6. Without deciding "whether the Sixth Amendment incorporates an exception for testimonial dying declarations," *Crawford* said, "If this exception must be accepted on historical grounds, it is *sui generis*." *Id.* Arguably, the doctrine is better regarded as a reflection of the forfeiture principle.[30] Either way, it has no bearing on this case. *Second*, throughout the 18th century courts were lenient in admitting prior consistent statements of a trial witness to bolster the witness's testimony in court.[31] Indeed, an annotation placed in the margin of Gilbert's celebrated treatise on evidence when that work was published posthumously in 1754 refers to *Thompson* (by citation only, not by name) for this proposition only.[32] But this doctrine also is clearly inapposite

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EVIDENCE IN CHILD ABUSE AND NEGLECT CASES § 3.2, at 206-07 (3d ed. 1997).

[30] *See supra* note 21.

[31] 4 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW (James H. Chadbourn rev. 1972) § 1123, at 254; *see, e.g.*, 2 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 431 (1721).

[32] *See supra* note 26.

to a case like the present one, in which the complainant did not testify at trial.[33]

In the decades after the adoption of the Confrontation Clause in 1791, the common law continued, generally under the rubric of hearsay, to develop in solicitous regard for the confrontation right. The modern concept of hearsay – an out-of-court statement offered to prove the truth of what it asserts – emerged.[34] The general rule excluding hearsay was subject to two sorts of limitations.

First, some types of statements that fit the definition of hearsay were excepted from the rule – but as noted in *Crawford*, 541 U.S. at 56, except for dying declarations, these did not include statements of a testimonial nature offered against a criminal defendant. *See supra* note 24.

Second, a statement might be admitted to prove the truth of some proposition other than what it asserted; with admissibility limited in this way, the statement did not pose a confrontation problem.[35] For example, especially in rape cases it was common practice to prove that the alleged victim had made a complaint shortly after the incident. But only "the fact of making the complaint immediately" was admissible,

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[33] *See Crawford*, 541 U.S. at 59 n.9 (preserving the rule of *California* v. *Green*, 399 U.S. 149 (1970), that there is no Confrontation Clause violation if the declarant testifies at trial).

[34] Note, for example, the following passage from 1 S. MARCH. PHILLIPPS, A TREATISE ON THE LAW OF EVIDENCE 229 (7th ed. 1829), not found in earlier editions (including the 6th edition of 1824): "Hearsay is not admitted in our courts of justice, as proof of the fact which is stated by a third person."

[35] That continues to be the law. *See Crawford*, 541 U.S. at 59 n.9, affirming the rule of Tennessee v. Street, 471 U.S. 409 (1985).

generally because it supported her credibility;[36] the particulars of the complaint, including the identity of the assailant, were not.[37]

Similarly, alongside the hearsay rule developed the concept of *res gestae*, which provides not an exception to the rule against hearsay but a way around it: If the making of the statement has significance as a part of the incident that is the subject of the litigation, then it may be admitted on that basis, without relying on the statement as an accurate narrative of events.[38] Professor Gallanis cites a case from 1794 relying on

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[36] 1 THOMAS STARKIE, A PRACTICAL TREATISE ON THE LAW OF EVIDENCE 148 (3d ed. 1830). Starkie cites *Thompson* for this proposition. *See supra* note 26.

[37] *See, e.g.*, 1 S. MARCH PHILLIPPS, *supra* note 34, 233 ("the particulars of the complaint, stated by her on the former occasion, are clearly not admissible as evidence of the truth of her statement"); R. v. Osborne, Car. & M. 622, 624, 174 E. R. 662, 663 (1842) (allowing evidence that the victim named some person as the perpetrator immediately after the attack, but the question "whose name was mentioned" could not be asked); R. v. Megson, 9 Car. & P. 420, 422, 173 E. R. 894, 895 (1840) ("All that could safely be received was . . . her complaint that a dreadful outrage had been perpetrated upon her," not "the particulars of the complaint as independent evidence"); R. v. Walker, 2 M. & Rob. 212, 174 E. R. 266 (1839).

[38] One leading treatise described the distinction this way:

> If the declaration or entry has no tendency to illustrate the question, except as a mere abstract statement, detached from any particular fact in dispute, and depending for its effect entirely on the *credit* of the person who makes it, it is not admissible in evidence; but if, on the contrary, any importance can be attached to it as a circumstance which is part of the transaction itself, and deriving a degree of credit from its connection with the circumstances,

this doctrine – but a civil case, not involving an excited utterance, and not even referring to the doctrine by name.[39] The term itself appeared shortly after that and in 1805 a judge in a civil case referred to the statement in *Thompson* as having been "given in evidence as part of the res gestæ"; this appears to be the first judicial citation of *Thompson*.[40] Soon after that, the *res gestae* doctrine began to be elaborated in the treatises.[41]

Through most of the nineteenth century and well into the twentieth, courts on both sides of the ocean adhered rigidly to the principle that the *res gestae* doctrine only supported admissibility of a statement that was (a) made contemporaneously with, or at most a short time after the event it described, and (b) not "a narrative of a past occurrence."[42] By the time Wigmore wrote the first edition of his treatise at the turn of the twentieth century, these constraints had begun to

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> independently of any credit to be attached to the speaker or writer, then the declaration or entry is admissible in evidence.

1 THOMAS STARKIE, A PRACTICAL TREATISE ON THE LAW OF EVIDENCE, at pt. I, § 28, at 47 (1st Am. ed. 1826).

[39] Gallanis, *supra* note 24, at 535 & n. 266, 537 & n. 288.

[40] Aveson v. Kinnaird, 6 East 188, 193-94, 102 E.R. 1258, 1261 (1805).

[41] Gallanis, *supra* note 24, at 533 & n.251.

[42] 22 CORPUS JURIS § 556, at 467-68 (1920) ("A statement which is merely narrative of past transactions or events is not admissible as part of the res gestæ, even though it was made soon after the occurrence to which it relates.") (citations omitted); Friedman & McCormack, *supra* note 14, at 1215, *quoting* Upton v. Commonwealth, 2 S.E.2d 337, 339 (Va. 1934).

bend. Wigmore greatly accelerated the development.[43] Citing *Thompson* as his earliest authority, he argued that some cases reflected not merely the *res gestae* doctrine but a genuine hearsay exception – that is, if uttered under sufficient excitement caused by a stressful event or condition, a statement *could* be admitted as an accurate report of what it asserted. Acknowledging that the existence of this exception had not always been clear, he claimed only that it had been established for about a generation.[44]

Over the course of the twentieth century, the restraints on the excited utterance exception progressively loosened.[45] This Court's decision in *White v. Illinois,* 502 U.S. 346 (1992), ensured – until *Crawford* – that the Confrontation Clause would pose no obstacle to the admission of statements that were deemed excited utterances or spontaneous declarations for purposes of hearsay law. Prosecutors naturally took advantage of the leeway the courts allowed them, frequently securing admission of accusatory statements made shortly after the incident at issue, without even the need to demonstrate the accuser's unavailability. But, common as the practice had become before *Crawford* restored independent force to the confrontation right, it remains clear that at the time of the Framing and for many years before and after, the practice would not have been tolerated.

That older rule, the one that prevailed before Wigmore's focus on reliability dominated understanding of the confrontation right, is the one that squares with a sound conception of the right. The present context, involving an

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[43] Friedman & McCormack, *supra* note 14, at 1217-20.

[44] 3 JOHN HENRY WIGMORE, A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW 2249-50 (1st ed. 1904)

[45] Friedman & McCormack, *supra* note 14, at 1220-24.

accusation made to a police officer, illustrates the point vividly. That such an accusation is made hastily or in excitement does not rob it of its testimonial character or mean that it is of no concern under the Confrontation Clause. On the contrary, if such accusations may be used to secure a conviction, then we have countenanced a system in which accusers may make their accusations in a form that may easily be relayed to court but without satisfying any of the conditions long required for prosecution testimony – so long as the accusers speak in haste and excitement.

## III. THE INDIANA SUPREME COURT'S RULE INVITES MANIPULATION AND CREATES IMPROPER INCENTIVES.

### A. The Indiana Supreme Court's Rule Improperly Treats Pre-Recording Oral Accusations Made at the Scene of the Alleged Crime as Not Testimonial.

The basic principle advocated here is that accusatorial statements made to a known police officer are testimonial. Far from advocating such a categorical rule, the Indiana Supreme Court declared explicitly that "responses to initial inquiries by officers arriving at a scene are typically not testimonial." J.A. 102. This assertion understates the effect of the court's decision in two respects.

First, the decision applies broadly to inquiries made at the scene of an investigation, not merely to initial inquiries made upon arrival there. Although Mrs. Hammon's accusation resulted from what the Indiana Supreme Court characterized as "the initial exchange between Mooney and Amy," J.A. 104, the *actual* initial exchange – the one that was made when the officers "arriv[ed] at [the] scene" – was utterly unproductive from the viewpoint of the officers and, later, the prosecution.

In *that* exchange, Officer Mooney asked Mrs. Hammon whether there was a problem[46] and she answered that "nothing was the matter, that everything was okay." J.A. 14. It was only after the officers went inside the house, looked around, spoke to Petitioner, met Mrs. Hammon separately from the Petitioner, and pressed the matter again that she made the accusation that was the basis for Petitioner's conviction.[47]

Second, the decision is not merely an assessment of the typical case. Rather, it amounts to a virtually *per se* rule that an oral accusation made to an officer at the scene before any writing or other recording has been made is not testimonial. Given the Indiana Supreme Court's holding in this case it is hard to imagine circumstances in which that court would regard as testimonial an oral accusation made at the scene before any recording. The court supposedly considered the situation from the perspective of the speaker, Mrs. Hammon, but in such a cursory and conclusory way that this amounted to no consideration at all.[48] Rather, the court explicitly gave principal

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[46] The officer himself characterized this as his "initial question." J.A. 15.

[47] This repeated questioning gives the interaction between Officer Mooney and Mrs. Hammon the quality of an "interrogation," though the case should not turn on that matter.

[48] The court said, "Amy's motivation was to convey basic facts and there is no suggestion that Amy wanted her initial responses to be preserved or otherwise used against her husband at trial." J.A. 104. The court provided no support for this conclusion, which is patently dubious at best. Indeed, the "basic facts" that Mrs. Hammon conveyed in her [not really initial] oral statement were those constituting a battery. Whatever her reluctance and mix of feelings, Mrs. Hammon was making an accusation of a serious crime to an investigating police officer; the only plausible conclusion is that she anticipated governmental use of this accusation, and she should be

consideration – incorrectly, for reasons discussed above in Part I – to the motivation of the questioning officer, J.A. 100 ("the motive of the questioner, more than that of the declarant, is determinative"), concluding that Officer Mooney "was principally in the process of accomplishing the preliminary tasks of securing and assessing the scene." J.A. 104. But the court's application of the standard to this case demonstrates how manipulable that standard is.[49]

If Officer Mooney is deemed to have taken Mrs. Hammon's oral statement to "secure" the scene, then that characterization will always be possible. The officers needed no new information to secure the scene; they knew who and where the protagonists were. Indeed, the scene was already secure – Mrs. Hammon and Petitioner were separated, one officer with each. Moreover, Officer Mooney's next move after receiving the oral statement did nothing to make the scene more secure. In compliance with his routine practice, he brought out an affidavit form for Mrs. Hammon to complete and sign, which she did.[50] There is no indication in the record that he had

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deemed to have intended this natural consequence of her actions. Even if the question were whether Mrs. Hammon "wanted" her oral statement preserved or used against Petitioner, and even if Petitioner had the burden of demonstrating that this was so – neither of which is so – the contents of the statement, together with the fact that *the very next thing Mrs. Hammon did* was to fill our a battery affidavit, would be far more than sufficient to carry that burden.

[49] *Cf. Crawford*, 541 U.S. at 65-66 ("*Roberts*' failings were on full display in the proceedings below. . . . The case is . . . a self-contained demonstration of *Roberts*' unpredictable and inconsistent application.").

[50] Q After your conversation with Mrs. Hammon, where did you direct your attention next? What did you do after you finished your conversation with Mr. [sic] Hammon?

to leave the house to get the form. The affidavit was simply an effort to record evidence,[51] and the oral conversation immediately beforehand was part of the process by which the officer secured the affidavit. On any reasonable view of the facts, then, at least "in significant part" Officer Mooney took the oral statement "for purposes of . . . potential future use in legal proceedings," J.A. 100.[52]

Similarly, if Mrs. Hammon's statement is deemed to have been taken for the purpose of assessing the scene, then this characterization will be satisfied by any oral accusation made at the scene of an alleged crime before any writing or other recording has been taken. By the time Mrs. Hammon made her

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A I had her fill out and sign a battery affidavit and I asked her if she would.

J.A. 18.

[51] Q And what's the purpose of that document?

A To establish events that have occurred previously.

J.A. 18.

[52] Indeed, Counsel of Record for the State appears to have acknowledged as much when he said, referring to the possibility that this Court might hold Mrs. Hammon's accusation to be testimonial, "The confrontation clause should not be construed in a way that would discourage police from determining whether the victim needs immediate protection." Leonard Post, *Eyes on Clarifying 'Crawford': Thousands of Cases Hang in Balance*, Nat'l L. J., Oct. 24, 2005, at 1. We believe the fear reflected by this comment is completely unfounded, *see infra* p. 40, but what is relevant here is that the only way conduct of the police at the scene of the alleged crime *could* be altered by a judicial holding that certain statements are inadmissible is if the police are thinking ahead to trial and motivated at least in substantial part by evidentiary considerations.

accusation, Officer Mooney had, by his own account, considerable evidence that Petitioner had committed a battery on his wife. He began with the original disturbance report, which appears to have been enough for him to bring a battery affidavit form into the house with him. At the house, he observed Mrs. Hammon's frightened demeanor, Petitioner's acknowledgment that there had been an argument, and the physical signs of a very recent disturbance. This was enough to warrant pressing the matter a second time with Mrs. Hammon because it strongly suggested an assault, but one key piece of evidence was lacking: an accusation by her. Of course, it was possible that no crime had been committed (and Petitioner denies that one had been), but that is always true; it is not the job of the investigating officer to determine guilt beyond a reasonable doubt. Even after hearing an accusation, the officer may have considerable doubt as to whether a crime has been committed. In any event, *before* an accusation has been made, the officer will always have – and will always be able to testify that he had – significant doubt on that score. If that is enough to render a statement non-testimonial, as the Indiana Supreme Court held in this case, then the first accusation made orally and at the scene will never be deemed testimonial, no matter how strong the officer's understanding may be beforehand that one consequence of his efforts will be the gathering of evidence for potential use in prosecution.

**B. The Indiana Supreme Court's Rule Encourages Manipulation by Police Officers and Gives Them Improper Incentives.**

Assuming hypothetically that, notwithstanding all the above arguments, an accusation to a police officer falls outside *Crawford* if the officer was still "securing and assessing the scene," the police have a ready protocol to secure from cooperative witnesses accusations that can be admitted at trial

without the accuser ever taking an oath or facing the accused or cross-examination.

First, the officer should refrain from securing the scene until after interviewing the person he thinks may be an accuser – or at least he should not complete the task, so that he can later contend that the scene was not yet secure.

Second, the officer should interview the person he thinks may be an accuser at the scene of the incident, rather than at the station-house; if he waits until the station-house, he cannot contend that he was securing and assessing the scene.

Third, in conducting the interview, the officer should attempt to avoid what might be characterized as "structured . . . questioning," the response to which is necessarily testimonial. *Crawford*, 541 U.S. at 53 n.4. But if one open-ended question does not yield an oral accusation, it is acceptable to try a second time; that is what Officer Mooney did.

Fourth, the officer should be prepared to testify that until the interviewee made an oral accusation – which will be sufficient to gain a conviction – he had not reached a conclusion as to whether a crime had been committed, and if so what.[53]

Fifth, the officer should be prepared to testify that until that time the accuser was still agitated or otherwise appeared to be under the influence of the event in question. This will presumably satisfy the excited utterance exception to the rule against hearsay and therefore also satisfy any remaining

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[53] *Cf.* State v. Lewis, 619 S.E.2d 830, 844 (N.C. 2005) (concluding that before speaking with accuser, officer "had reason to believe a crime may have been committed, but the seriousness and factual existence of a crime had not yet been established").

requirement under the Confrontation Clause, assuming the accusation is not deemed testimonial.[54]

Sixth, until after the making of that accusation, the officer should neither write anything down, otherwise record it, nor ask the witness to do so, because the recording itself and subsequent communications are likely to be considered testimonial. But once the witness has made an accusation orally, the prudent course is to record it.[55]

If the officer follows this roadmap, then under the Indiana Supreme Court's approach that will be enough for the oral accusation to be admitted without the accuser having to come to trial or take an oath and face cross-examination and without even a need to demonstrate her unavailability. This will be true irrespective of whether, in conducting the interview, the officer fully expected and hoped that the witness would accuse the defendant of a crime. Similarly it will not matter that, in

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[54] *Crawford* indicates that *Roberts* might still apply with respect to non-testimonial statements, 541 U.S. at 68, and *Roberts* would be satisfied by showing that a statement falls within the hearsay exception for excited utterances or spontaneous declarations. White v. Illinois, 502 U.S. 346 (1992).

[55] The Indiana Supreme Court recognizes that if the officer asks for a written statement as soon as the witness makes an oral one, that written statement itself is testimonial. J.A. 104. Nevertheless, the officer has good reason to ask for such a statement then. Perhaps most importantly, if the witness testifies subject to cross-examination at trial, then the Confrontation Clause "places no constraints at all on the use of his prior testimonial statements. See *California v. Green*, 399 U.S. 149, 162 (1970)." *Crawford*, 541 U.S. at 59 n.9. And, under the decision of the Indiana Supreme Court, the officer has no reason *not* to ask for a written statement then, because doing so does leaves unaffected the conclusion that the oral statement was not testimonial.

making an accusation to a police officer, a person of ordinary understanding in the witness's position would necessarily anticipate that the criminal justice system would use the information just conveyed against the defendant.

In short, the decision of the Indiana Supreme Court creates terrible incentives for police officers. First, the decision gives a police officer an incentive to delay securing the scene and protecting victims.[56] This is not simply a matter of balancing competing priorities of security and proof. Rather, the decision of the Indiana Supreme Court means that securing the scene will actually undermine the ability of the prosecution to introduce evidence, because once the scene is secure, then subsequent oral statements are likely to be deemed testimonial.

Second, the decision of the Indiana Supreme Court gives the officer hope that he may procure an accusation that could be admitted at trial in the absence of the accuser – but only if he avoids questioning that will be deemed to be an interrogation.[57] Thus, the officer must forgo arguably structured questioning and instead ask vague, open-ended questions that may be less likely both to yield full information and to allow him to secure

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[56] For this reason, we believe, with respect, that Counsel for the State got it exactly wrong when he suggested that reversing the decision of the Indiana Supreme Court "would discourage police from determining whether the victim needs immediate protection." *See supra* note 52.

[57] *See Sample* Crawford *Predicate Questions,* 1 THE VOICE 8 (Nov. 2004), *available at* http://www.ndaa-apri.org/pdf/the_voice_vol_1_issue_1.pdf (proposing that police officers be asked predicate questions at trial such as: "Were the statements taken during 'the course of an interrogation'?" "Were your questions to her an interrogation or merely part of your initial investigation?"; "Were these questions asked in order to determine whether a crime had even occurred?").

the scene quickly. Similarly, the officer should refrain from trying to calm the accuser down or give her a chance to compose herself before speaking to her, he should avoid anything that might seem like a reminder to tell the truth or an assessment of her truth-telling capacity.[58]

In contrast, the proper rule, under which accusatorial statements made to police officers are categorically recognized to be testimonial, leaves officers' incentives undistorted. It recognizes that the confrontation right is not a rule governing police conduct but rather a fundamental rule of judicial procedure.[59] Police are free to protect victims, to apprehend suspects, and to gather evidence, all as they see fit in the circumstances of the particular case. Performance of their duties is not deflected by an attempt to take accusatory statements in a form that can be introduced at trial if the accuser does not testify subject to confrontation.

Finally, and ironically, the evidence allowed by the Indiana Supreme Court in this case is inferior to that rejected by *Crawford*. In *Crawford*, the statement was audio-taped, so that at least the jurors had no doubt about what the witness actually said and they could hear how Sylvia Crawford sounded as she made her statement. Under the Indiana Supreme Court's holding, all the trier of fact had to go on was the police officer's second-hand report of an oral statement made to him in the presence of no one else.

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[58] *Cf.* Allie Phillips, *Child Forensic Interviews after* Crawford v. Washington: *Testimonial or Not?*, THE PROSECUTOR 17, 27 (July/August 2005) (suggesting danger under *Crawford* of using truth-lie test despite concern of many forensic interviewers that absent such test interview will lack legitimacy).

[59] *See* Kentucky v. Stincer, 482 U.S. 730, 738 n.9 (1987) ("The Court sometimes has referred to a defendant's right of confrontation as a 'trial right.'").

*Crawford* effectively ruled that testimony given in the station-house rather than face-to-face with the accused and subject to cross-examination is not an acceptable method of proof. The State should not be allowed to attain the same objective that *Crawford* denies them, by using at trial an accusation that was never subjected to confrontation and was given at the crime scene instead of in the station-house. No doubt, *Crawford* will pose some close and difficult cases. This is not one of them.

## CONCLUSION

The decision of the Indiana Supreme Court should be reversed.

Respectfully submitted,

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IN THE

# Supreme Court of the United States

HERSHEL HAMMON,
*Petitioner,*

v.

STATE OF INDIANA,
*Respondent.*

**On Writ of Certiorari to the Indiana Supreme Court**

## BRIEF OF RESPONDENT

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## QUESTION PRESENTED

Whether a victim's oral statements to police responding to an emergency dispatch are "testimonial" statements within the meaning of *Crawford v. Washington*, 541 U.S. 36 (2004), when there is no evidence of interrogation and the police are merely assessing the situation.

## TABLE OF CONTENTS

**Page**

QUESTION PRESENTED ..... i

TABLE OF AUTHORITIES ..... iv

STATEMENT OF THE CASE ..... 1

SUMMARY OF THE ARGUMENT ..... 7

ARGUMENT ..... 12

I. "Testimonial" Statements Arise from Inquisitorial Practices, Not Emergency Assistance ..... 12

A. The text of the Confrontation Clause limits which statements are "testimonial" ..... 14

B. The Framers sought to prevent the historical abuse of conducting trials by using statements procured through formal extrajudicial examinations with no opportunity for cross-examination ..... 15

1. The continental civil-law practices ..... 16
2. Pre-Marian specialty and prerogative courts ..... 17
3. Practices under the Marian Bail and Committal Statutes ..... 20

C. Historically and colloquially, "interrogation" means coercive questioning that is easily recognizable as such ..... 22

D. The Court's Confrontation Clause precedents confirm that "testimonial" statements are derived from formal inquisitorial practices ..... 25

II. Statements to Officers Whose Actions or Questions Reasonably Relate to the Immediate Safety of Persons or Property Are Not "Testimonial" ..... 27

III. Neither a Statement's Content Nor a Declarant's Expectations Has Any Connection to Defining "Testimonial" under the Confrontation Clause ..... 31

A. Whether a statement "accuses" has no relationship to whether it is "testimonial" ..... 32

B. Whether a reasonable declarant would have understood the statement to be available for prosecution has no Confrontation Clause roots ..... 35

IV. The Confrontation Clause Should Not Bar Using Initial Victim Statements in Typical Domestic-Violence Trials ..... 39

A. In domestic-violence cases, it is typically the defendant, not the State, that keeps the victim from testifying at trial ..... 40

B. Victims of domestic violence are typically motivated by concerns for safety ..... 42

V. Amy Hammon's Oral Statements to Officer Mooney Were Not "Testimonial" ..... 43

CONCLUSION ..... 47

## TABLE OF AUTHORITIES


| Cases | Page |
|---|---|
| *Barber v. Page*, 390 U.S. 719 (1968) | 26 |
| *Bruton v. United States*, 391 U.S. 123 (1968) | 26 |
| *California v. Green*, 399 U.S. 149 (1970) | 26, 35, 41 |
| *Chambers v. Mississippi*, 410 U.S. 284 (1973) | 42 |
| *Crawford v. Washington*, 541 U.S. 36 (2004) | *passim* |
| *Cruz v. New York*, 481 U.S. 186 (1987) | 26 |
| *Douglas v. Alabama*, 380 U.S. 415 (1965) | 26 |
| *Dutton v. Evans*, 400 U.S. 74 (1970) | 27 |
| *Idaho v. Wright*, 497 U.S. 805 (1900) | 27, 28 |
| *Kirby v. United States*, 174 U.S. 47 (1899) | 26 |
| *Lee v. Illinois*, 476 U.S. 530 (1986) | 26 |
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| *Motes v. United States*, 178 U.S. 458 (1900) | 26 |
| *Nelson v. O'Neil*, 402 U.S. 622 (1971) | 41 |
| *Ohio v. Roberts*, 448 U.S. 56 (1980) | 33 |
| *Parker v. Randolph*, 442 U.S. 62 (1979) | 26 |
| *Pointer v. Texas*, 380 U.S. 415 (1965) | 26 |
| *Rhode Island v. Innis*, 446 U.S. 291 (1980) | 23 |
| *Roberts v. Russell*, 392 U.S. 293 (1968) | 26 |

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**Constitutional Provision**

U.S. Const. amend. VI (Confrontation Clause) ..... *passim*

**English Cases**

*Raleigh's Case*, 2 How. St. Tr. 1 (1603) ..... 15

*R. v. Brasier*, 1 Leach 199, 168 Eng. Rep 202 (1779) ... 34, 35

**English Statutes**

Marian Committal Statute, 2 & 3 Phil. & M. c. 10 § 2 (1555) ..... 20, 21

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## STATEMENT OF THE CASE

This case illustrates a phenomenon all too common in American society. A deeply conflicted battered wife, discovered alone on her front porch, denies to a first-responder that she has been abused and is in danger. Ultimately, when the police, concerned for her safety, discover the irrefutable physical traces of domestic abuse, she tells of her beating. The State prosecutes, but the wife, perhaps forgiving and loving, perhaps frightened, perhaps without independent means of support, will not bear witness at trial against her abuser, who, after all, is also her husband. To prosecute, the State must use the wife's oral statement at the scene to the first-responding officer.

The prosecution of this case bears no resemblance to the inquisitorial abuses that gave rise to the Confrontation Clause. The conviction does not depend on prior statements in the form of a deposition, prior hearing or trial testimony, or affidavit. There was no inquisition, no secret examination, no Tower of London, no interrogation, and no refusal to bring forth witnesses demanded by the defendant. Here, all we have are reasonable efforts by the police, dispatched to the scene of an emergency, to gauge any immediate danger and respond as necessary. Unless *all* hearsay is "testimonial," the victim's oral statements to police in this case must be admissible.

1. On February 26, 2003, at 10:55 p.m., Peru Police Department Officers Jason Mooney and Rod Richardson responded to a dispatch concerning a domestic disturbance at 590 East Fifth Street, the home of Hershel and Amy Hammon. J.A. 81. When the officers arrived at the Hammon home, Officer Mooney found Amy on the front porch of her house. *Id.* To Officer Mooney, Amy appeared "[t]imid" and "frightened." J.A. 13, 81. Officer Mooney

asked Amy "if there was a problem and if anything was going on," and Amy answered "'No,'" that "nothing was the matter'" and "that everything was okay." J.A. 14, 81.

From Amy's "somewhat frightened" demeanor, however, Officer Mooney sensed a need to do more. *See* J.A. 13-15, 25, 81. At that point, Officer Mooney "didn't feel safe leaving the premises when we were responding to a call of a fight due to her state of frighteness. I didn't know if someone had told her to tell them everything was okay and that everything actually wasn't." J.A. 25. So, Officer Mooney next asked Amy whether he could enter her house to "check things out" and "make sure . . . that everything was okay." J.A. 14. Amy consented. *Id.*

Entering the house, Officer Mooney noticed immediately that the Hammon living room was in disarray. J.A. 15. In a corner of the room lay shattered glass from what had been the front panel of a gas heater. J.A. 16. Flames from the heater flickered in the open. *Id.* There were children in the home. J.A. 26.

Spotting Hershel in the kitchen, Officer Mooney asked him "if everything was okay" and "[i]f he and his wife had been in an argument." J.A. 16, 32. Hershel admitted that he and Amy had argued but claimed that "everything was fine now and it never became physical." J.A. 16. Officer Mooney returned to Amy, who was now in the living room, leaving Officer Richardson with Hershel in the kitchen. J.A. 17.

Officer Mooney's trial examination provides the best account of what happened when he left the kitchen:

**Q** Where did you proceed after that?

**A** I proceeded to enter the living room where Amy was located to speak with her.

**Q** And what did she tell you at that time?

**BY MR. SPAHR**: Objection, hearsay.

**BY THE COURT**: I'll show it as a continuing objection.

**A** She informed me that she and Hershel had been in an argument. That he became irrate [sic] over the fact of their daughter going to a boyfriend's house. The argument became verbal, excuse me, the argument became physical after being verbal and she informed me that Mr. Hammon, during the verbal part of the argument was breaking things in the living room and I believe she stated he broke the phone, broke the lamp, broke the front of the heater. When it became physical he threw her down into the glass of the heater . . .

**BY MR. SPAHR**: Objection as to the physical aspects of this matter, it's all hearsay.

**Q** Are you reporting what she told you?

**A** Yes.

***

**Q** What did . . . what did she tell you in regards to the physicality of the altercation?

**A** She informed me Mr. Hammon had pushed her onto the ground, had shoved her head into the broken

glass of the heater and that he had punched her in the chest twice I believe.

***

**Q** Did you observe any injuries to Mrs. Hammon?

**A** No.

**Q** Did she indicate to you that she has any injuries or pain?

**A** She was, while speaking to her she was rubbing her . . .

**BY MR. SPAHR**: Again, renew my objection to any statements attributed to her.

**BY THE COURT**: We'll show it as a continuing objection.

**A** While speaking to her she began rubbing her right eyebrow, above her right eyebrow and she informed me that that was where her head was shoved into the glass and it was hurting her at that time.

J.A. 15-21.

Officer Mooney also testified that Hershel tried at least twice to enter the living room, and that each time Amy became quiet, "almost afraid to speak." J.A. 32. The transcript relates no additional prompting of Amy's oral statements to Officer Mooney.

2. Amy completed a battery affidavit recounting what she had already told Officer Mooney, and the officers arrested Hershel, who was prosecuted for Class A misdemeanor domestic battery. J.A. 2-3. Hershel was found guilty after a bench trial. J.A. 40-41. Despite the prose-

cutor's subpoena, Amy was not present at the trial. J.A. 7. Over Hershel's continuing hearsay objections, the trial court admitted Officer Mooney's recitation of Amy's oral disclosures at her home that February night, concluding that they constituted "excited utterances." J.A. 11-13. It also admitted her battery affidavit as a "present sense impression." J.A. 19-20. The trial court sentenced Hershel to one year in jail, with all but 20 days suspended. J.A. 47.

3. Hershel appealed his conviction, claiming the trial court erred when it admitted Amy's affidavit and Officer Mooney's testimony recounting Amy's oral statements. J.A. 66-67. After briefing, but before decision, *Crawford v. Washington*, 541 U.S. 36 (2004), held that out-of-court testimonial statements are inadmissible under the Confrontation Clause absent declarant unavailability and a prior opportunity for cross-examination.

The Indiana Court of Appeals upheld the trial court's decision to admit Officer Mooney's testimony concerning Amy's oral statements (though it did not address the admissibility of the affidavit), concluding those statements were not "testimonial" under *Crawford*. J.A. 75-77. The court observed that "the common denominator underlying the Supreme Court's discussion of what constitutes a 'testimonial' statement is the official and formal quality of such a statement." J.A. 75. Amy's oral statement to Officer Mooney, the court observed, "was not given in a formal setting even remotely resembling an inquiry before King James I's Privy Council." J.A. 75-76

Notably, the Court of Appeals understood the colloquial meaning of "interrogation" to be (1) "'questioning formally or officially,'" *see* J.A. 76 (quoting *The American Heritage College Dictionary* 711 (3d ed. 2000)), with (2) "a connotation of an at least slightly adversarial setting" where authorities question "'thoroughly and relentlessly to verify

facts . . . .'" J.A. 76-77 (quoting *Roget's Thesaurus II* 556 (Exp. ed. 1988)). Accordingly, Officer Mooney's encounter with Amy did not "fit within a lay conception of police 'interrogation,' bolstered by television, as encompassing an 'interview' in a room at the stationhouse" or "bear the hallmarks of an improper 'inquisitorial practice.'" J.A. 77 (citing *Crawford*, 541 U.S. at 51).

4. Hershel sought discretionary review in the Indiana Supreme Court, which granted his request. J.A. 83-84. Like the Court of Appeals, the Indiana Supreme Court affirmed the trial court unanimously, agreeing that Amy's oral statements to Officer Mooney qualified as excited utterances under Indiana Rule of Evidence 803(2) and were not "testimonial" under *Crawford*. J.A. 87, 104. The court also ruled Amy's battery affidavit inadmissible under *Crawford*, but that its admission was harmless error. J.A. 104-06.

Particularly in light of the concern in *Crawford* with the "'[i]nvolvement of government officials in the production of testimony with an eye toward trial,'" *see* J.A. 101 (quoting *Crawford*, 541 U.S. at 56 n.7), the court held that "a 'testimonial' statement is one given or taken in significant part for purposes of preserving it for potential future use in legal proceedings." J.A. 100. In this evaluation, "the motive of the questioner, more than that of the declarant, is determinative, but if either is principally motivated by a desire to preserve the statement it is sufficient to render the statement 'testimonial.'" *Id.* Under this standard, according to the court, "responses to initial inquiries by officers arriving at a scene are typically not testimonial." J.A. 102.

The court explained that this "'use in legal proceedings'" inquiry is consistent with the "formal testimonial situations" described in *Crawford*, including "police interrogations." J.A. 101. From examples recited in *Crawford*, the court inferred that the term "'police interrogation' is properly

limited to attempts by police to pin down and preserve statements rather than efforts directed to determining whether an offense has occurred, protection of victims or others, or apprehension of a suspect." J.A. 102. The court reasoned that a first-responding officer's initial inquiries would not likely be an "interrogation," nor would any responses thereto likely be motivated by a desire to preserve evidence for a trial. *See id.*

Applying these principles, the court held that "the undisputed facts" of this case show that Amy's exchange with Officer Mooney "fell into the category of preliminary investigation in which the officer was essentially attempting to determine whether anything requiring police action had occurred and, if so, what." J.A. 104. In other words, because Officer Mooney was "responding to a reported emergency," he "was principally in the process of accomplishing the preliminary tasks of securing and assessing the scene." *Id.* For her part, Amy was merely imparting "basic facts" without suggesting that she wanted her utterances "to be preserved or otherwise used against her husband at trial." *Id.* Accordingly, the court deemed Amy's oral statement not testimonial. *Id.*

## SUMMARY OF THE ARGUMENT

The judgment permitting use at trial of Amy Hammon's oral statements to Officer Mooney should be affirmed, but for reasons other than those articulated by the decision below. In *Crawford v. Washington*, 541 U.S. 36 (2004), the Court acknowledged that distinctions exist between "testimonial" statements and other extrajudicial statements. However, analyzing whether a statement is "testimonial" based on the expectations of either the questioner or the declarant, as suggested by the Indiana Supreme Court, has no connection to the text or history of the Confrontation Clause. A coherent definition of "testi-monial" statements must

instead respect the differences between the practices that gave rise to the Confrontation Clause and modern police public-safety functions, which in no way resemble those civil-law abuses.

I. The State advocates the following general rule: Extrajudicial statements are "testimonial" only when they resemble the forms of testimony that were produced by the abusive inquisitorial practices that gave rise to the Confrontation Clause. This "resemblance test" sweeps within the meaning of "testimonial" statements all of the forms of extrajudicial statements that characterized the inquisitorial trials of the civil-law practices, the specialty and prerogative court practices, and Marian-statute practices. The modern "testimonial" statements with most resemblance to those historical abuses include affidavits, deposition transcripts, prior-hearing and trial transcripts, grand-jury testimony, and responses to police interrogation. *See Crawford*, 541 U.S. at 68.

The text of the Clause supports the resemblance test. The entire inquiry into the meaning of "testimonial" statements arises because *Crawford* ruled that the key word from the Confrontation Clause is "witnesses," which means "one who bears testimony." *Id.* at 51. According to early nineteenth-century dictionaries, "testimony," in turn, refers to "solemn" statements, including "affirmations." *Id.* These terms underscore the formalities attendant to "testimonial" statements at the time of the Founding.

As *Crawford* recognized, the formal qualities of the historical inquisitorial abuses are unmistakable. *See id.* at 50. Sir Walter Raleigh was convicted based on transcripts of Lord Cobham's coerced private examination before the Privy Council. The inquisitorial procedures of the civil-law system emphasized trial by secret, often coercive, interrogatories. Trial by affidavit, deposition, and confessions coerced in

secret also permeated the Crown's specialty and prerogative courts, most notoriously the Star Chamber. And under the Marian statutes, justices of the peace interrogated witnesses in private looking for inculpatory testimony and certified the resulting "pretrial depositions" for trial.

*Crawford* also acknowledged that this history supports treating the results of "interrogations"—understood colloquially—as "testimonial" statements. *Id.* at 53 n.4. Both historically and colloquially, "interrogations" are characterized by formal, coercive, tactically structured police questioning. The broader and more technical understanding of "interrogation" that applies under the Fifth Amendment does not work here because there is no risk that a declarant will unknowingly waive confrontation rights. When police interrogate, they embark on distinctive, highly purposeful strategies for extracting incriminating statements, much like the justices of the peace. Questioning that accompanies incidental or emergency police encounters with witnesses has never been understood as "interrogation."

The Court's Confrontation Clause precedents are consistent with this focus on the formalities that necessarily accompany "testimonial" statements. *Crawford* itself deemed a statement to be testimonial because it occurred at the stationhouse, under the protection of *Miranda* warnings, and was "knowingly given in response to structured police questioning." *Id.* at 53 n.4, 65. Other cases precluding admission of extrajudicial statements under the Clause concerned testimony from prior trials or hearings or custodial interrogations by police or their agents.

II. The State also advocates the following corollary to the "resemblance test": "Testimonial" statements do not include statements made in response to police actions or questions reasonably related to an objectively reasonable concern for the immediate safety of any persons or property.

This "immediate-safety" rule makes sense in light of the historical context of the Confrontation Clause. The Founding generation did not suffer abuses at the hands of government agencies charged with protecting public safety. The Sixth Amendment, rather, was targeted at trial-by-inquisition and the practices of the justices of the peace under the Marian statutes. When police are reasonably asking questions in order to protect persons or property, their actions in no way resemble the historical abuses leading to trial by secret deposition.

It is important to bear in mind that the immediate-safety rule may apply even where a particular attack has subsided. In such circumstances the police often will need to learn additional information to understand whether individuals need medical care and whether an immediate safety threat remains. Particularly in domestic-violence cases, the immediate safety of the victim may remain in jeopardy even after an attack subsides, and the police will need to know what happened to understand whether to offer shelter or other assistance.

III. The text and history that support the resemblance and immediate-safety tests provide no grounds for Petitioner's argument that "testimonial" hearsay is that which "accuses" or that which a reasonable declarant should reasonably anticipate may be used in an investigation or trial.

Petitioner candidly acknowledges that, to rule his way, the Court must add "accusations to known police officers" to the list of "testimonial" statements identified in *Crawford*, but he provides no reasons why the Court should do so. *See* Pet. Br. 20. In fact, Petitioner disclaims any connection between his "accusation" test and the history of the Confrontation Clause. He argues instead for inquiring whether a statement "performs the *function* of testimony," *i.e.*, whether it "transmits information for use in investigation

or prosecution of crime." Pet. Br. 12-13. This test—unsupported as it is by constitutional text and history—would sweep within the ambit of "testimonial" statements nearly *all* hearsay, an outcome that *Crawford* has already rejected. *Crawford*, 541 U.S. at 51-52.

As for Petitioner's apparently alternative "reasonable-anticipation" argument, it too bears no relationship to the history and text of the Confrontation Clause. Petitioner attempts to obviate this problem by recasting the Confrontation Clause as simply an American version of an absolute ancient tradition rather than a response to particular historical abuses. But such a predicate is not only historically agnostic, it also would seem to negate *any* limit to the notion of "testimonial statements." Ultimately, Petitioner's entire argument depends on overriding *Crawford*'s holding that the Confrontation Clause is concerned with a "specific type" of hearsay. *Id.* at 51.

IV. The circumstances surrounding domestic-violence cases such as this are especially distinguishable from the civil-law inquisitorial abuses. Unlike the practices under the Marian statutes and in the prerogative and specialty courts, where the Crown prevented cross-examination of witnesses, in domestic-violence cases it is typically the defendants themselves who are responsible for the victim's absence from trial. The victim may refuse to testify because of overt threats from the defendant, or simply because she wishes to continue a relationship with the defendant. Either way, the defendant would be able to cross-examine the victim simply by calling her to the stand. Accordingly, regardless of how the Court defines "testimonial statement," prosecutors should be able to use victims' crime-scene statements to carry their burdens as long as they fulfill their compulsory-process obligations to secure witnesses called by the defense.

Furthermore, if the Court concludes—as it should not—that the subjective motivations of declarants do matter, it should bear in mind statistics showing that victims of domestic violence often initially deny their abuse, later recant their stories of abuse, and ultimately refuse to testify at trial. This data suggests that victims of domestic violence who overcome the odds and actually tell the police about their plight are typically motivated by a need for safety, not a desire for justice.

V. Under the resemblance test and its immediate-safety corollary, Amy Hammon's oral statements to Officer Mooney were not "testimonial," even though her affidavit was. When Amy Hammon told Officer Mooney that her husband had beaten her, she was in her living room, not in a formal or coercive setting. The police were there not to examine witnesses in search of evidence against a previously charged suspect, but to provide emergency assistance. Amy Hammon initially denied there was a problem, but she was obviously frightened and Officer Mooney took more action because he was concerned for her safety. The transcript does not show any further questioning, but even if some minimal questioning did occur, there is no evidence of any sort of "interrogation." Furthermore, when Officer Mooney approached Amy Hammon for the second time, he had evidence indicating some type of immediate threat, but he needed to learn more to confirm and address that threat. Amy Hammon's oral statements were therefore not "testimonial."

## ARGUMENT

### I. "Testimonial" Statements Arise from Inquisitorial Practices, Not Emergency Assistance

In *Crawford v. Washington*, 541 U.S. 36, 42-43, 51 (2004), the Court ruled that, while all "testimony" is subject

to the right to confront the declarant under the Sixth Amendment, *not* all extrajudicial statements are "testimonial." *Crawford* disclaimed creation of a comprehensive definition of "testimonial," but the Court was clear that limits do exist. "The constitutional text, like the history underlying the common-law right of confrontation thus reflects an especially acute concern with a specific type of out-of-court statement." *Crawford*, 541 U.S. at 51. "Testimonial" is defined by the Constitution's text and, at least equally significant, by reference to the historical abuses that prompted adoption of the Confrontation Clause.

Consonant with these holdings, the State proposes the following rule: *A statement is "testimonial" only when it resembles the forms of testimony that were produced by the abusive inquisitorial practices that gave rise to the Confrontation Clause.* Under this rule, the term "testimonial" would apply, as stated in *Crawford*, to affidavits as well as "to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." *Id.* at 68; *see also id.* at 53 n.4 (stating that "interrogation" is meant in its "colloquial" rather than "technical legal" sense).

Equally important, however, is the following corollary of this "resemblance" test: *"Testimonial" statements do not include statements in response to actions or questions reasonably related to an objectively reasonable concern for the immediate safety of any persons or property.* Excluding such statements from being "testimonial" statements makes sense because the Confrontation Clause was not crafted in response to any historical abuses resembling modern-day public-safety functions of the police.

The "resemblance test" and its "immediate-safety" corollary protect against the "modern practices with closest kinship to the abuses at which the Confrontation Clause was directed." *Id.* at 68. They also ensure the closest possible fit

between "modern practices" and the historical practices targeted by the Framers before a statement will be deemed "testimonial." *See id.*; *cf. United States v. Patane*, 542 U.S. 630, 640-41 (2004) (plurality opinion). These principled, historically justified rules for what is "testimonial" exclude Amy Hammon's oral statements to Officer Mooney in her home shortly after he responded to an emergency dispatch. Therefore, the statements can be admitted without offending the Sixth Amendment.

### A. The text of the Confrontation Clause limits which statements are "testimonial"

*Crawford* began its analysis with the plain text of the Confrontation Clause, which provides the right of a defendant to be "confronted with the witnesses against him." U.S. Const. amend. VI. From this text, the Court observed that it applies only to "witnesses," meaning those who "bear testimony." *See Crawford*, 541 U.S. at 51. Quoting Webster's early nineteenth-century understanding, the Court understood that "testimony" "is typically '[a] *solemn declaration or affirmation* made for the purpose of establishing or proving some fact.'" *Id.* at 51 (quoting 2 Noah Webster, *An American Dictionary of the English Language* 91 (Found. for Am. Christian Educ. 1989) (1828)) (emphasis added). Thus, "giving testimony" and "bearing witness" suggest solemn, formal settings and the statements derived therefrom.

Webster, it bears observing, also defined "solemn" using several markers of formality, such as "marked with pomp and sanctity; attended with religious rites" and "impressing or adapted to impress seriousness." 2 Webster, *supra*, at 75. Webster understood that "declaration," *see* 1 Webster, *supra*, at 56, meant a statement of fact in any context, but that "affirmation" suggested something more, implying at the very least a "[c]onfirmation" or "ratification" of an assertion

by another. *See id.* at 5. Then, as now, "affirmation" also bore a highly formal and direct connection to legal proceedings, as in "[a] solemn declaration made under the penalties of perjury, by persons who conscientiously dēcline taking an oath; which affirmation is in law equivalent to testimony given under oath." *Id.*

Thus, in relying on Webster, *Crawford* effectively linked the textual use of "witness," meaning "one who gives testimony," to statements given in formal settings that impress the seriousness of the statement, often under oath or with other religious rites, and perhaps confirming or ratifying the suggestion of another. *See Crawford*, 541 U.S. at 51.

### B. The Framers sought to prevent the historical abuse of conducting trials by using statements procured through formal extrajudicial examinations with no opportunity for cross-examination

*Crawford*'s historical overview shows that the right of confrontation developed in response to specific procedural abuses arising from trial by affidavits and depositions. It also confirms that the Confrontation Clause does not codify the law of hearsay as it existed at the time at the founding. Rather, the Clause responds to the Founder's reaction to systemic procedural abuses.

The most frequently cited historical predicate for the Confrontation Clause, of course, is the 1603 trial of Sir Walter Raleigh, who, tried by a written record of coerced formal Privy Council examinations of Lord Cobham and others, demanded that the court "'[c]all my accuser before my face,'" but was refused. *Crawford*, 541 U.S. at 44 (quoting *Raleigh's Case*, 2 How. St. Tr. 1, 15-16 (1603)). Even beyond Raleigh, however, each of *Crawford*'s historical vignettes shows that the abuses giving rise to the Confrontation Clause involved formal, deliberate, carefully

crafted processes for producing witness statements, not only with an eye toward trial, but also with an eye toward excluding the declarant from that trial. *See Crawford*, 541 U.S. at 43-47.

It is not necessary to recount *Crawford*'s entire historical overview, but some additional details concerning the civil-law practices, the English Crown's specialty and prerogative courts, and practices under the Marian statutes underscore the limited contours of "testimonial" statements as originally understood.

### 1. The continental civil-law practices

As explained in *Crawford*, the continental civil-law practices for admitting testimony at trial were exactly what the Framers sought to avoid with the Confrontation Clause. *See Crawford*, 541 U.S. at 50. The civil-law system was based on inquisition rather than accusation and permitted judges or their designated representatives to undertake examinations of witnesses and to read the resulting testimony to the trial court. 5 William S. Holdsworth, *A History of English Law* 170-75 (1927). In this "*inquisitionsprozess*," there was no opportunity for a criminal defendant to cross-examine the witness at the pretrial examination or at the trial. *See* John H. Langbein, *Prosecuting Crime in the Renaissance* 233-34 (1974); *see also* Holdsworth, *supra*, at 170-75.

This civil-law history further establishes a highly formal set of procedures for producing testimony.

> In the inquisitorial system used on the Continent, accusation and prosecution rested with the court; there was no definite accuser and the charges were neither formally specified nor revealed to the accused. The inquisitorial system's emphasis on

> secrecy continued throughout the proceedings. The names of witnesses against the accused were not revealed; the accused was tried by secret interrogatories, often obtained through the use of torture, and even the final sentence was not publicized.

Margaret A. Berger, *The Deconstitutionalization of the Confrontation Clause: A Proposal for a Prosecutorial Restraint Model*, 76 Minn. L. Rev. 557, 569 n.50 (1992) (citing 5 Holdsworth, *A History of English Law* 170-75 (2d ed. 1937)).

**2. Pre-Marian specialty and prerogative courts**

The separate development of the English common law and its right of confrontation notwithstanding, specialty courts in England used deposition evidence in procedures more akin to those developed according to the civil-law model.

a. By the time of Richard II, for example, the use of deposition testimony in the trials in the Court of Admiralty was regular. *See* 30 Wright & Graham, *Federal Practice and Procedure: Evidence* § 6342, at 202-23 (1997); *see also*, Langbein, *Prosecuting Crime*, *supra*, at 81. In vice-admiralty procedure, the examination process was quite formal, using interrogations or examinations in private before the judge. *See Records of the Vice-Admiralty Court of Rhode Island 1716-1752* 93 (Dorothy S. Towle ed., 1936). An early nineteenth-century treatise described the procedure of the admiralty courts as follows: "The witnesses are to be secretly and separately examined, not in the presence of the parties or other witnesses. Their depositions, after being read over to them article by article, and then asked whether there be anything which they wish to alter or amend, are then

to be signed by the witness . . . ." Arthur Browne, *A Compendious View of the Civil Law* 421 (2d ed. 1802).

As noted in *Crawford*, admiralty practice has special significance for the Confrontation Clause, for in 1765 the Sugar Act and Stamp Act further extended the reach of admiralty jurisdiction over the colonists. *See Crawford*, 541 U.S. at 47-48; *see also* Berger, 76 Minn. L. Rev. at 579; Murl A. Larkin, *The Right of Confrontation: What Next?*, 1 Tex. Tech L. Rev. 67, 71 (1969); Daniel H. Pollitt, *The Right of Confrontation: Its History and Modern Dress*, 8 J. Pub. L. 381, 396 (1959). The Stamp Act was repealed in 1766 following public outcry and numerous riots. *See* Carl Ubbelohde, *The Vice-Admiralty Courts and the American Revoluation* 3 (1960). However, just a year later, the passage of the Townshend Acts continued colonial subjugation to the admiralty courts. *See id.* at 97-100. Furthermore, directly after the Stamp Act was repealed, Parliament passed a resolution that all traitors would be taken to England to be tried, thereby ensuring that all testimony would be given by deposition rather than in open court. *See* Larkin, 1 Tex. Tech L. Rev. at 71-72.

In sum, the admiralty process, which perhaps most directly provided the rationale for the Confrontation Clause, employed trial by secret, formal examinations of witnesses.

b. Meanwhile, the Privy Council, a prerogative court that also reached back to Richard II, began to act as a pseudo-court to actualize the whims of the monarch by the time of the Tudors and Stuarts. *See* Albert Venn Dicey, *The Privy Council* 25, 68-75, 94-105, 112-14 (1887). Summonses to appear before the Council "were made instruments of extortion" and were handed down in instances where the public courts were unable to reach a guilty verdict. *See id.* at 68-69, 71, 113-14.

The Privy Council reached its juridical nadir during the late sixteenth century with the development of the Court of the Star Chamber, which was often used to try elite offenders who common-law juries might be afraid to convict. *See* Dicey, *supra*, at 94-105; *see also* 30 Wright & Graham: *Federal Practice and Procedure: Evidence* § 6342, at 219-20 (1997); James Fitzjames Stephen, *A History of the Criminal Law of England* 169 (Burt Franklin 1964) (1883). The Star Chamber "could dispense with ordinary procedure in extraordinary cases, using interrogations designed to trap the accused into a confession." *See* Berger, 76 Minn. L. Rev. at 569-70 (citing Leonard W. Levy, *Origins of the Fifth Amendment* 182 (1968)).

> In Star Chamber proceedings, the accused could be committed to prison indefinitely pending trial. He was required to swear the oath ex officio that he would answer all questions truthfully, both orally and in writing—even though he was ordinarily not informed of the charges against him, nor allowed counsel. After swearing the oath, and without counsel, the defendant was confronted with interrogatories based on information furnished through the secret examinations.

*Id.* at 570 n.51 (citing Levy, *supra*, at 182-84). Any inconsistencies between the accused's answers and the interrogatories were used, sometimes aided by torture, to force confessions. *See id.* at 570 n.51 (citing Holdsworth, 2d ed., *supra*, at 178-88); *see also* Stephen, *supra*, at 176 (noting that the Star Chamber "proceeded by bill and answer, and administered interrogations to the accused party, whom they examined under oath."); Dicey, *supra*, at 114-15 (observing that the Star Chamber was the only court that employed torture).

In the prerogative courts, "testimonial" statements were highly formal, coerced, and taken in secret with no intention that the witness would ever be produced at trial.

### 3. Practices under the Marian Bail and Committal Statutes

Parliament enacted the Marian Bail and Committal Statutes of 1555 in order to facilitate the production of evidence and impose more regularity into the process of criminal prosecutions. *See* Langbein, *Prosecuting Crime*, *supra*, at 24, 34-35. The Marian Committal Statute required that the justices of the peace "take examination of said Prisoner, and information of those that bring him, of the fact and circumstances [of the crime], and the same, or as much thereof as shall be material to prove the felony, shall be put in writing" following which "said examination the said Justices shall certify at the next general Gaol Deliver to be holden within the limits of their Commission." 2 & 3 Phil. & M. c. 10 (1555). These certified documents became known as "pretrial depositions." John H. Langbein, *Origins of Adversary Criminal Trial* 41 (2003).

More specifically, the justice-of-the-peace manuals instructed that the witness be interrogated under oath (although some justices took sworn testimony while others did not). *See, e.g.*, Robert P. Mosteller, *Crawford v. Washington: Encouraging and Ensuring the Confrontation of Witnesses*, 39 U. Rich. L. Rev. 511, 555-59 (2005) (noting that the witness was present before the justice of the peace in "a modestly formal setting, likely the [justice's] 'parlor.'"). The justices were only required to record that portion of the witness' statement that proved the guilt of the accused. *See* John H. Langbein, *The Historical Origins of the Privilege Against Self-Incrimination at Common Law*, 92 Mich. L. Rev. 1047, 1060-61 (1994). Those portions (and only those portions) were then presented at the accused's trial. *See id.*

The justices of the peace could also bind the witness over for the accused's trial by requiring a bond. *See id.*; *see also* 2 & 3 Phil. & M. c. 10 § 2 (1555). The government would often introduce the certified transcript of the examination. *See* Langbein, 92 Mich. L. Rev. at 1060 ("The emphasis on testimony against the accused was deliberate. The [justice of the peace] was not . . . meant to gather evidence impartially. The Marian system was designed to collect only prosecution evidence."); *see also United States v. Gecas*, 120 F.3d 1419, 1442-45 (11th Cir. 1997).

Over the next century, courts increasingly used certified Marian preliminary examinations at trial, and criminal proceedings assumed a more inquisitorial quality. *See* Berger, 76 Minn. L. Rev. at 569. In fact, in 1848, Parliament enacted a statute that codified the right to be present during witness examinations and depositions, but it protected only individuals who had *already* been charged with indictable crimes. 11 & 12 Vict., c. 42, § XVII (1848). The Act thus presupposed that the abuses to be addressed occurred through formal procedure, not happenstance encounters. *See id.*

* * * *

History shows that the abuses that worried the Framers arose from statements given in deliberate, structured, solemn, and highly coercive settings. *See also* 3 William Blackstone, *Commentaries on the Law of England* 373-74 (1768) (recognizing that jury-trial and confrontation rights arose in response to civil-law abuses, such as trial by deposition). Through the Confrontation Clause, the Framers meant to enshrine rights against trial by these well-defined inquisitorial practices. As a matter of history, statements cannot be "testimonial" if they do not arise from circumstances resembling these.

### C. Historically and colloquially, "interrogation" means coercive questioning that is easily recognizable as such

Based on the history of the Confrontation Clause, *Crawford* swept within the definition of "testimonial" any "[s]tatements taken by police officers in the course of interrogations." *Crawford*, 541 U.S. at 52. Statements given during "interrogations" are "testimonial" because "[p]olice interrogations bear a striking resemblance to examinations by justices of the peace in England." *Id.* at 52. Those historical examinations were characterized at the very least by formal process, the singular purpose of generating inculpatory and unimpeachable evidence, and by coercion and torture. *See* Part I.B, *supra*.

The Court did not define "interrogation" precisely but noted that it was using "'interrogation' in its colloquial, rather than any technical legal, sense" and observed that Sylvia Crawford's statement, given while she was in custody and a suspect herself, qualified as "testimonial" because it was "knowingly given in response to structured police questioning." *See Crawford*, 541 U.S. at 53 n.4. Under both historical and contemporary understandings, it is exactly such "structure" in a coercive environment that differentiates "interrogations" from other interactions with the police. *See also State v. Barnes*, 854 A.2d 208, 211 (Me. 2004) (deeming statements by a victim upon running into a police station not to be testimonial because "she was not responding to *tactically structured police questioning* as in *Crawford*, but was instead seeking safety and aid") (emphasis added).

1. A "colloquial" under-standing of "interrogation" implies purposeful, considered, and even coercive efforts to draw from a witness information that would be helpful to an ongoing investigation. It is highly instructive that, when

disclaiming a "technical legal" meaning of interrogation, *Crawford* contrasted *Rhode Island v. Innis*, 446 U.S. 291 (1980), which held that "inter-rogation" for *Miranda* purposes includes both "express questioning" and "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response." *Id.* at 300-01; *see also Crawford*, 541 U.S. at 53 n.4.

*Innis* adopted this particularly broad notion of "interrogation" because "the *Miranda* safeguards were designed to vest a suspect in custody with an *added measure* of protection against coercive police practices." *Innis*, 446 U.S. at 301 (emphasis added). That is, broadly defining "interrogation" for *Miranda* warnings provides greater protection against unwitting waivers of Fifth Amendment rights. There is no comparable need to protect against unwitting waivers in the Confrontation Clause context and, therefore, a similarly expansive application of "inter-rogation" is not justified here.

2. It is also relatively clear that when police refer to "interrogation," they mean questioning that is tactical, structured, purposeful and manipulative, if not coercive. Just to scratch the surface, the Reid Technique, one of the leading police-interrogation strategies, distinguishes between "interviews" and "interrogations," noting that "interviews" may take place in "a variety of environments," including "a person's home or office, in the back seat of a squad car, or on a street corner." Fred E. Inbau, *et al.*, *Criminal Interrogation and Confessions* 6 (4th ed. 2005). On the contrary, "interrogations" should be conducted by specially trained personnel and not the "arresting officer" who may lack special training. *See id.* at 65. Moreover, the interrogation should occur in a sound-proofed room, with the interrogator sitting near and maintaining eye contact with the

witness. *See id.* at 57-64. By the same token, when scholar Saul Kassin trains his critical eye on abusive police interrogations, rather than concentrating on informal or highly fluid contacts between police and citizens, he conducts experiments to test the effects of tactics like those used in the Reid Technique. *See, e.g.*, Saul M. Kassin & Karlyn McNall, *Police Interrogations and Confessions: Communicating Promises and Threats by Pragmatic Implication*, 15 L. & Hum. Behav. 233, 234-35 (1991).

Policy debates concerning interrogations also tend to focus on what happens in highly structured environments. For example, a recent movement to require additional safeguards against police coercion has focused on videotaping interrogations. *See, e.g.*, DeWayne Wickham, *Film All Police Interrogations*, USA Today, Sep. 24, 2002, at 13A. This approach obviously assumes that "interrogations" occur in a controlled environment rather than through incidental or emergency encounters.

The Indiana Court of Appeals observed below that "interrogation," colloquially understood, does not include *all* police questioning, but only that which occurs "'formally or officially'" or at least "'thoroughly and relentlessly.'" J.A. 76-77 (quoting *The American Heritage College Dictionary* 711 (2000); *Roget's Thesaurus II* 556 (Exp. ed. 1988)). The Court of Appeals even noted how the "lay" understanding of "interrogation" as stationhouse drama derives from television shows. J.A. 77. And, indeed, the television drama NYPD Blue, which "tends to treat the interrogation as the dramatic focus" portrays "interrogations" as carefully staged, merciless jailhouse psychological manipulation, sometimes accompanied by physical violence. Susan Bandes & Jack Beermann, *Lawyering Up*, 2 Green Bag 2d 5, 6-10 (1998). Even editorial cartoonists frequently target large audiences with caricatures of "good-cop, bad-cop" interrogation routines featuring suspects seated in uncomfortable chairs with

bare light bulbs shining in their faces. *See* CartoonStock *available at* http://www. cartoonstock.com/directory/i/interrogation.asp (last visited Jan. 30, 2006).

The point is that "interrogation" in its "colloquial sense" is closely associated with both police custody and easily discernible, yet often highly sophisticated and manipulative, police tactics and techniques. Such interrogation may foster more effective investigation, but it may also enable the abuses targeted by lawyers and scholars and portrayed by the media. *See* Kassin & McNall, 15 L. & Hum. Behav. at 234-35. Such widespread attention to this type of interrogation surely is not a fluke. It no doubt relates back to the historical fears and abuses that underlie the Fifth and Sixth Amendments—sophisticated and coercive police production of evidence that occurs in a setting specifically designed for covert activity and for overcoming witness independence. *Id.*

Accordingly, while technical police custody may not always be part of an "interrogation," there must be some measure of objectively discernible, coercive, tactically structured police questioning. Otherwise, the Court will risk extending Confrontation Clause protections to a whole range of incidental or emergency police contacts with citizens that lie well beyond the abuses the Framers sought to prevent. As the Indiana Court of Appeals ruled below, "[w]hatever else police 'interrogation' might be," it is not "preliminary investigatory questions asked at the scene of a crime shortly after it has occurred." J.A. 77.

### D. The Court's Confrontation Clause precedents confirm that "testimonial" statements are derived from formal inquisitorial practices

Decisions by this Court excluding evidence based on Confrontation Clause objections support the notion that

"testimonial" statements are statements given in circumstances that parallel the inquisitorial practices that the Framers deemed offensive. In *Crawford* itself, the "testimonial" statement was "knowingly given in response to structured police questioning." *Crawford*, 541 U.S. at 53 n.4. Specifically, Sylvia Crawford's statement occurred at the stationhouse several hours after the alleged crime, after she had been read her *Miranda* rights, and "[i]n response to often leading questions from police detectives." *Id.* at 65. The Court expressly recognized that these circumstances modeled the very civil-law trial-by-inquisition that the Confrontation Clause was intended to prevent. *Id.* at 52.

*Crawford* also catalogued several cases where statements falling within the Clause's protections were actual prior trial or preliminary hearing testimony, both of which obviously bear hallmarks of the formal statements the Framers sought to exclude from trial absent witness unavailability and a prior opportunity for cross-examination. *See Crawford*, 541 U.S. at 57 (citing *Mancusi v. Stubbs*, 408 U.S. 204, 213-16 (1972); *California v. Green*, 399 U.S. 149, 165-68 (1970); *Barber v. Page*, 390 U.S. 719, 722-25 (1968); *Roberts v. Russell*, 392 U.S. 293, 294-95 (1968); *Douglas v. Alabama*, 380 U.S. 415, 418-20 (1965); *Pointer v. Texas*, 380 U.S. 400, 406-08 (1965); *Motes v. United States*, 178 U.S. 458, 470-71 (1900); *Kirby v. United States*, 174 U.S. 47, 55-61 (1899); *Mattox v. United States*, 156 U.S. 237 (1895)).

In addition, several cases have forbidden the admission of statements resulting from custodial police interrogations. *See, e.g., Lilly v. Virginia*, 527 U.S. 116, 121 (1999) (excluding statements where the police questioned the accomplice multiple times and told him that unless he "broke 'family ties'" he might be dragged into "a life sentence"); *see also Cruz v. New York*, 481 U.S. 186 (1987); *Lee v. Illinois*, 476 U.S. 530 (1986); *Parker v. Randolph*, 442 U.S. 62 (1979); *Bruton v. United States*, 391 U.S. 123 (1968) (all

barring use of a confession resulting from custodial interrogation against a codefendant). These are classic examples of tactically structured, formal police questioning, *i.e.*, "interrogation."

Also illustrative are *Idaho v. Wright*, 497 U.S. 805 (1990), and *Dutton v. Evans*, 400 U.S. 74, 87 (1970). In *Wright*, the Court rejected using statements of a child in police custody responding to a physician's questions about alleged sexual abuse. *See Wright*, 497 U.S. at 809, 826-27. The physician was essentially an agent of the police engaged in a custodial interrogation. In *Dutton*, the Court approved using a prisoner's jailhouse accusatory statement to another prisoner where there was no "confession made in the coercive atmosphere of official interrogation" and no "use by the prosecution of a paper transcript." *See Dutton*, 400 U.S. at 87 (plurality opinion). These cases underscore the need, at the very least, for an interrogation or a transcribed statement for an utterance to be "testimonial."

## II. Statements to Officers Whose Actions or Questions Reasonably Relate to the Immediate Safety of Persons or Property Are Not "Testimonial"

The resemblance test, as noted above, gives rise to the corollary proposition that when police actions or questions reasonably relate to an objectively reasonable concern for the immediate safety of a victim, an officer, the public, or property, any statements resulting therefrom are not "testimonial." This "immediate-safety" rule, like the resemblance test itself, is consistent with Confrontation Clause history and practical to apply.

1. The immediate-safety rule follows from Confrontation Clause history. The Framers were simply not concerned about excluding statements to emergency responders from trial. As the modern police force did not

exist prior to the nineteenth century, there was no occasion for the Framers to consider whether the dangers inherent in trials-by-affidavit arose in circumstances where immediate public safety was at issue. The Privy Council's investigators were not dispatched to interrupt crimes in progress, catch fleeing suspects, or calm domestic disputes; they were commanded to produce evidence to convict particular defendants. *See* Dicey, *supra*, at 102-03. They were not trained to defuse highly volatile situations or to secure disaster scenes. Instead, they were trained to interview witnesses in very deliberate, coercive, and manipulative ways. *See id.* at 103-05.

By contrast, modern police often must work amidst chaos and great ongoing danger to themselves and to others. In such circumstances, they are far more concerned about protecting the innocent (including themselves) than prosecuting the guilty. Where police are reasonably acting to prevent immediate harm, they are unlikely to be engaged in the sort of coercive and manipulative evidence-producing tactics that prompted the Confrontation Clause. When police ask questions geared toward procuring information that can help them uncover and address immediate threats, any incriminating statements they hear will merely be incidental and not crafted or manipulated to fit a predetermined narrative. Where an officer can reasonably perceive a risk of immediate harm, accurate information from others is critical to an effective response.

2. The Court's prior Confrontation Clause holdings do not undermine the immediate-safety rule. In *Wright*, the Court required a child rape victim's statements to a physician to be excluded, but those statements were given in response to questions posed after the child was in protective police custody and more than a day after the sexual assault being investigated. *See Wright*, 497 U.S. at 809-10. Accordingly,

the questions could not reasonably be justified by a concern for the child's immediate safety.

*Crawford* described *White v. Illinois*, 502 U.S. 346, 349-51 (1992), which approved trial use of a "spontaneous declaration" to a police officer, as "arguably in tension with the rule requiring a prior opportunity for cross-examination when the proferred statement is testimonial." *Crawford*, 541 U.S. at 58 n.8. Hearsay-exception analysis aside, however, whether the child's statement to police in *White* was "testimonial" depends on several facts. The officer's conversation with the child, which lasted more than three hours before the child was transported to the hospital, occurred after the assailant had fled the scene and after the child's mother was present and aware of the attack. *White*, 502 U.S. at 349-50. These facts suggest no reasonable immediate-safety concerns. Yet other facts, such as whether any relationship existed between the child and the assailant and whether any householders were involved in the assault, could influence a reasonable officer's immediate actions. Thus, affirming here would not necessarily dictate any particular result in *White*.

3. That is not to say that the immediate-safety rule is necessarily inapplicable simply because a particular attack has subsided. First, officers or other first-responders may not be able to discern without asking questions whether an attack or other incident has actually subsided, or if it has, what medical attention or other public-safety precautions may yet be necessary. Second, just because a particular assault may have concluded, that does not necessarily mean that the immediate safety of the victims, even those who do not need medical attention, is secure.

Consider, for example, *Stancil v. United States*, 866 A.2d 799 (D.C. 2005), *reh'g granted and judgment vacated*, 878 A.2d 1186 (D.C. 2005), which drew an unnecessary,

arbitrary line for defining "testimonial" even as it ruled that statements while police are "securing the scene" are not testimonial. *See id.* 813-14. The court divided an emergency domestic-violence call into two stages divided by the moment when police "first secured the scene." *See id.* at 814. Statements *after* that moment were "testimonial." *See id.* at 814-15. This rule properly acknowledges that statements concerning immediate safety are not "testimonial," but as a purely temporal rule, it misses the mark. Even when a scene is "secure," police often must learn more to protect persons or property. They may need to know whether other assailants or other weapons still pose a danger. Or, perhaps most important for domestic-violence cases, they may need to learn what happened so they can, if necessary, provide assistance to prevent further attacks. An officer who arrives at a domestic-battery scene and then departs without either the assailant or the victim may leave the victim at imminent risk of suffering another beating.

4. One of the benefits of the immediate-safety test is that it does not require courts to inquire into the actual state of mind of either the declarant or the police officer. Such a subjective approach, to be sure, was embraced by the Indiana Supreme Court in the decision below. *See* J.A. 100-03. But as the Petitioner has ably demonstrated, subjective tests of any stripe pose great risks of inconsistent or unfair treatment. *See* Pet. Br. 18-21.

If the "primary purposes" of government officials were paramount, defendants who are similarly situated with respect to objectively verifiable facts may well receive different treatment based not on their own states of mind, but on states of mind of those they cannot control—the officers who investigated their cases. The Court has sought to avoid such "incongruous result[s]" in other contexts where, as here, no reason exists to incorporate officers' subjective motivations into constitutional analysis. *See, e.g., United*

*States v. Villamonte-Marquez*, 462 U.S. 579, 584 n.3 (1983) (holding that officers' drug-detection motive did not invalidate an otherwise proper boat seizure conducted pursuant to a suspicionless maritime document-inspection program). The immediate-safety test relieves any burden to analyze the subjective motivations of declarants or officers.

* * * *

As the Indiana Supreme Court recognized, it is highly likely that initial crime-scene declarations will relate to immediate-safety concerns, even if a particular crime is over or if the threat has, purely as a matter of fact, passed. *See* J.A. 93, 95. When arriving on the scene, police and other responders quite reasonably do not know whether a danger still exists, and their first job is to secure and assess the scene. *See* J.A. 104. At the same time, however, not all statements to first-responders necessarily demand the same treatment. Where an officer's questions go beyond what is reasonably related to immediate safety and begin to look more like a witness interrogation, the immediate-safety rule will not apply, regardless of the officer's state of mind. Like the resemblance rule itself, the immediate-safety rule is sound as a matter of constitutional text, history, and policy.

## III. Neither a Statement's Content Nor a Declarant's Expectations Has Any Connection to Defining "Testimonial" under the Confrontation Clause

Petitioner offers two tests for determining whether a statement is "testimonial." First, according to Petitioner, "[a] statement made to a known police officer (or other government agent with significant law enforcement responsibilities) and accusing another person of a crime is testimonial." Pet. Br. 10. Second, Petitioner posits that "the question should be whether a reasonable person in the position of the declarant would *anticipate* use of the

statement in investigation or prosecution of a crime." Pet. Br. 18 (emphasis original). The relationship between these two tests is not entirely clear. What is clear, however, is that neither has anything to do with the text or history of the Confrontation Clause nor with the rationale underlying *Crawford*.

### A. Whether a statement "accuses" has no relationship to whether it is "testimonial"

Petitioner candidly acknowledges that *Crawford* in no way mentioned or implicitly included accusations to police officers as such among various types of statements that are "testimonial." In fact, Petitioner blithely offers that "[i]n this case, the Court merely needs to add 'accusations made to known police officers' to that list." Pet. Br. 20.

However, Petitioner provides no textual or historical support for this suggestion. In fact, Petitioner essentially disclaims any argument from history, stating that, just because the Confrontation Clause was a response to particular abuses related to the "'civil-law mode of criminal procedure'" that "does not mean that the Confrontation Clause meant to allow judicial systems to provide any mode of testimony so long as it did not resemble that of the civil law." Pet. Br. 11 n.7 (quoting *Crawford*, 541 U.S. at 50). Translation: Petitioner's theory of which statements are "testimonial" has no relationship to the historical abuses the Framers sought to prevent.

Nor does Petitioner's argument have any footing in constitutional text. Notwithstanding any shorthand references to "accusers" in other cases, the Confrontation Clause does not protect the right to confront "accusers," it protects the right to confront "witnesses." *See* U.S. Const. amend. VI. In fact, the Clause's use of the term "witnesses" is the only reason to embark on a search for "testimonial"

statements covered by the Clause. *See Crawford*, 541 U.S. at 51-52.

In this vein, *Crawford* observed that the Framers were principally concerned not about the content of any particular statements, but about the "*[i]nvolvement of government officers* in the production of testimony with an eye toward trial." *Crawford*, 541 U.S. at 56 n.7 (emphasis added). Accordingly, whether a statement includes an "accusation" is irrelevant. The Framers presumably would have objected to using *any* coerced affidavit at trial without benefit of confrontation, even if it did not directly accuse the defendant. The Court retreated from *Ohio v. Roberts*, 448 U.S. 56 (1980), precisely to avoid rendering the Confrontation Clause "powerless to prevent even the most flagrant *inquisitorial practices*." *Crawford*, 541 U.S. at 51 (emphasis added).

Petitioner attempts to compensate for these textual and historical deficiencies by abnegating the very notion that the Confrontation Clause responds to a particular history, positing without support that the Clause requires exclusion of a variety of extrajudicial statements that have no relation to historical abuses. *See* Pet. Br. 12. In addition, Petitioner worries that adherence to the Clause's historical meaning would simply prompt avoidance of the "*characteristics* of trial testimony." *Id.* It is not entirely clear what this means, but if it is meant to suggest that adherence to history would simply prompt authorities and declarants to avoid civil-law inquisitorial practices, the State confesses that such avoidance should, indeed, be the principal result of enforcing the Confrontation Clause.

As an alternative to arguing from history, Petitioner asserts, again without any support, that "the critical consideration is whether, assuming statements of its kind are admissible, a system will have been created in which

witnesses may testify against an accused in some way other than the one required in a common-law trial, subject to confrontation of the accused." Pet. Br. 12. This consideration, in turn, depends on "whether the statement performs the *function* of testimony." *Id.* Yet Petitioner disclaims any need to offer a "detailed or precise exegesis of what that function is." *Id.* Instead, he offers a "serviceable, shorthand" description: The "function of testimony" is fulfilled "if the statement transmits information for use in investigation or prosecution of crime." Pet. Br. 12-13.

Given the overwhelming breadth of this "shorthand" description, a "detailed or precise" explanation indeed seems unnecessary because pretty much *any* statement useful at trial could be described as "information for use in investigation or prosecution of crime." Pet. Br. 13. What remains unclear, however, is why Petitioner finds it necessary to say that it "appears plain" that an "accusation . . . lies at the heart" of the matter. Pet. Br. 13. It would be far clearer for Petitioner simply to say that *all* hearsay, except perhaps co-conspirator statements, is "testimonial." Again, however, *Crawford* rejected this notion. *See Crawford*, 541 U.S. at 51-52.

While ignoring history when crafting his "accusation" test, Petitioner turns to history when he argues that there is no "excited utterance" exception to his proposed test. Pet. Br. 21. During the course of that discussion, Petitioner cites *R. v. Brasier*, 1 Leach 199, 168 Eng. Rep. 202 (1779), as supporting his "accusation" test. *Brasier* pardoned a man convicted of assaulting a child based on the testimony of her mother and another woman relating the child's accusatory statements to them. *Id.* at 202-03. Petitioner argues that *Brasier* turned on the rule that "no testimony whatever can be legally received except upon oath," which in turn proves that all extrajudicial accusations are "testimonial." *Id.* at 202

(quoted at Pet. Br. 27). For several reasons, *Brasier* cannot support the weight Petitioner places on it.

First, as described more fully in the *amicus curiae* brief of the States of Illinois *et al.*, *Brasier* was based on the rules regarding a child's competency to testify, not any determination regarding the "testimonial" nature of the statements. Indeed, contemporaneous treatises cited *Brasier* for the proposition that "recent" accounts of incidents are generally admissible. Ill. Br. 7, 13. Second, the Court has already made it clear that the Confrontation Clause was not intended to constitutionalize the hearsay laws at the time of the Founding. *See, e.g.*, *California v. Green*, 399 U.S. 149, 155-56 (1970). The admissibility *vel non* of particular evidence based on common-law hearsay rules is largely beside the point. And to the extent common-law hearsay rules are relevant, *see Crawford*, 541 U.S. at 56 & n.6 (noting possible Confrontation Clause exception for testimonial dying declarations based on common-law hearsay exception), the *amicus curiae* brief of Illinois *et al.* shows there is substantial evidence that Founding-era common law permitted a hearsay exception for "excited utterances" (including "accusatory" statements). Ill. Br. 6-14.

In the end, the notion of "testimonial" statements must have a limiting principle, but Petitioner's "accusation" test provides none. Moreover, that test has no connection to any constitutional history or text and ultimately derives from the view that no limiting principle exists. It should therefore be rejected.

### B. Whether a reasonable declarant would have understood the statement to be available for prosecution has no Confrontation Clause roots

Perhaps sensing that the "information for use" and "accusation" tests overreach in light of *Crawford*, Petitioner

urges the Court to inquire, apparently as an alternative, whether a reasonable declarant would have anticipated that the statement would be used at trial. *See* Pet. Br. 18. But this test, too, provides no real limits and has no connection to constitutional text or history.

Petitioner's "reasonable-anticipation" argument is largely a response to the Indiana Supreme Court's reliance on the apparent subjective motivations of Amy Hammon and Officer Mooney. *See* J.A. 100-03. To be absolutely clear on the matter, however, the State concedes that the Indiana Supreme Court's dual consideration of the *subjective motivations* of the officer and the declarant was not the proper test. As discussed in greater detail in Part I.B, *supra*, it was not the motivations of the civil-law authorities or declarants that prompted the Confrontation Clause so much as the nature of the practices employed for producing evidence. *See Crawford*, 541 U.S. at 50-51. Furthermore, as Petitioner argues, subjective-motivation tests are difficult to administer and can lead to incongruous results in similar cases. *See* Pet. Br. 18-21.

In terms of its relationship to the history and purpose of the Confrontation Clause, however, Petitioner's "reasonable-anticipation" argument fares no better than the subjective-motivation inquiries. As with his initial argument that all accusations to known police officers are "testimonial," Petitioner cites no authority for the proposition that a statement is testimonial just because a reasonable declarant would have anticipated its use at trial. It is certainly true that the abuses giving rise to the Confrontation Clause arose in circumstances where the declarant would have known that the statement was going to be used at trial. *See Crawford*, 541 U.S. at 52 (citing affidavits, prior testimony, depositions, and responses to custodial examinations or interrogations as the abuses that prompted the Confrontation Clause). But that does not mean that the Framers drafted the Clause to target

such knowledge or anticipation on the part of declarants. Rather, they drafted it to target abusive tactics by government authorities irrespective of the declarant's viewpoint.

Indeed, far from citing any constitutional history to support this argument, Petitioner once again dismisses the notion that the history of the Confrontation Clause has any role in discerning its proper application. In particular, Petitioner argues that the existence of police and prosecutors is utterly inconsequential because the "right to confront adverse witnesses predates" such officials by more than 2,000 years, with the Confrontation Clause itself predating the modern police force by close to a century. *See* Pet. Br. 16. Examining the role of such officials, he says, "ignores the fundamental nature of the accused's right, which is to be confronted with the *witnesses* against him." *Id.* Accordingly, the Confrontation Clause is not to be understood in light of its historical purpose, but solely as the American manifestation of an absolute, ancient tradition that, as described by Petitioner, apparently prohibits admission of *any* hearsay evidence at trial against a criminal defendant. *See* Pet. Br. 15-17 (describing several unprompted extrajudicial statements that the Clause should prohibit from being used at trial).

This argument not only ignores the historical investigatory role of other officials (such as justices of the peace), but it also leads to the conclusion that "witnesses" must refer to *everyone* whose statements, regardless of context, are offered at trial. In other words, if the Confrontation Clause admits of no historical understanding, no legitimate basis exists for distinguishing among extrajudicial statements in search of statements that are "testimonial." The objective viewpoint of the declarant has no better claim to relevance than, say, the subjective motivation of the officer.

Nor does it help Petitioner that "[t]he Clause is violated only when a Court admits the statement in support of a prosecution without the accused having an opportunity to confront the witness." Pet. Br. 17. This may be true, but it does not follow that "it is not essential that [a statement] be received by a government officer" to be testimonial. *Id.* In fact, the role of government officials in procuring extrajudicial statements was critical to the advent of the Confrontation Clause. *See* Part I.B, *supra.*

It also does not logically follow that "the critical perspective" must be that of the declarant, or that there is necessarily any critical perspective at all. Pet. Br. 17. Petitioner adverts to the Sixth Amendment's text on this point, but that text provides a right to confront "witnesses," not "witnesses who reasonably should anticipate that the statement may be used at trial." *See id.* Petitioner must, but does not, provide some other rationale for applying the "reasonable-anticipation" rule.

Ultimately, Petitioner's reliance on what a reasonable declarant would have anticipated is yet another meaningless, unjustified pretension of limits. In truth, it would deem nearly *all* statements to police officers or other government agents to be "testimonial," because how could a reasonable person *not* anticipate that such statements could be used at trial? Apparently, Petitioner's objective in proposing this test is not to provide a principled limit on the scope of "testimonial" statements to authorities, but to *expand* the scope of "testimonial" statements to include some, or all, statements to individuals who are not government agents. *See* Pet. Br. 17. Thus, as with the "accusation" test, the "reasonable-anticipation" test derives largely from the premise that *all* extrajudicial statements introduced at trial are "testimonial." The Court rejected this premise in *Crawford* and it should reject Petitioner's arguments here as well.

## IV. The Confrontation Clause Should Not Bar Using Initial Victim Statements in Typical Domestic-Violence Trials

Domestic-violence cases inherently present what may be, with the possible exception of child-abuse cases, a unique combination of circumstances that simultaneously obstruct, yet intensify the need for, successful criminal prosecutions: low victim cooperation and high same-victim recidivism. *See* Tom Lininger, *Prosecuting Batterers after Crawford*, 91 Va. L. Rev. 747, 768-71 (2005); *see also* Bureau of Justice Statistics, *Preventing Domestic Violence Against Women* (1986) (noting that during a six-month period following an episode of domestic violence, 32% of women are victimized again). Frequently, the victims of domestic violence are deeply conflicted about their plight and refuse to testify at trial. *See* Lininger, 91 Va. L. Rev. at 769-71. Yet without successful prosecution, these victims are likely to be battered again. *See* Am. Med. Ass'n, *Diagnostic and Treatment Guidelines on Domestic Violence* 6 (1992), *available at* http://www.ama-assn.org/ama1/pub/upload/mm/386/domesticviolence.pdf (stating that 47% of husbands who batter their wives do so three or more times per year).

To obtain convictions against domestic abusers and thereby stop the cycle of violence for many victims, prosecutors have come to rely on the testimony of emergency first-responders (including police) who testify as to what they were told by the victim at the scene of an emergency dispatch. *See* Lininger, 91 Va. L. Rev. at 771. Several characteristics of domestic-violence cases should, consonant with the history and purposes of the Confrontation Clause, permit such prosecutions to continue.

### A. In domestic-violence cases, it is typically the defendant, not the State, that keeps the victim from testifying at trial

History shows that the rights of confrontation and compulsory process arose from the Crown's practices of developing evidence for criminal prosecutions in secret and then shielding that evidence from attack. *See* Pollitt, 8 I. Pub. L. at 381 (1959) (confrontation clause); *see generally* Peter Westen, *The Compulsory Process Clause*, 73 Mich. L. Rev. 71, 71-108 (1974-75). Modern domestic-violence cases, however, have no founding-era analogue, and if they present any risk of tyranny, it is at the hands of defendants, not the State.

In domestic-violence cases, defendants typically have ample contact with the victim, at least in circumstances where the victim refuses to cooperate with the prosecution. *See* Lininger, 91 Va. L. Rev. at 770 (noting that generally domestic-violence victims attempt to leave their abusers several times before they are successful and that the most dangerous time for the victim is when she ends the relationship). In fact, it is implicitly the defendant's influence over the victim, rather than the State's, that keeps the victim from testifying. *See* Lininger, 91 Va. L. Rev. at 769-71. Often the abuser will expressly threaten further violence if the victim testifies. *See id.* at 769 ("One study found that batterers threaten retaliatory violence in as many as half of all cases, and 30 percent of batterers actually assault their victims during the predisposition phase of prosecution."). And even where no overt intimidation occurs, if the victim continues an intimate relationship with the abuser, that relationship will naturally discourage the victim's cooperation with the prosecution. *See id.* at 769-71.

Indeed, it is highly disingenuous for domestic-violence defendants to complain about any lack of ability to cross-

examine their accusers. In this case, for example, the prosecution subpoenaed Amy Hammon, but she refused to attend the trial, presumably because she wished to continue being married to Petitioner and did not want to see him convicted of a crime. *See* J.A. 63-65, 82-83 (noting that the victim did not wish to have a no-contact order after the conviction). Rather than force an uncooperative victim to take the stand and either condemn her husband or perjure herself— while reliving the trauma of her abuse—the prosecution relied on Officer Mooney to relate Amy Hammon's oral description of events. *See* J.A. 8-35.

At this point, if Petitioner believed himself to be innocent, he, unlike Sir Walter Raleigh, had options. Namely, *he* could have called Amy Hammon to the stand and could have invoked his Sixth Amendment right to compulsory process if she refused to testify. In that circumstance, the State's case would depend not on *sponsoring* Amy Hammon's testimony, but rather on simply *producing* her (to the extent required by the Compulsory Process Clause) so that Petitioner might cross-examine her.

In short, if a victim would be uncooperative (as so often happens in domestic-violence cases), then as long as the State satisfies its compulsory-process obligations, it should be able to use the victim's crime-scene statement to help carry its evidentiary burden, regardless of how the Court ultimately defines a "testimonial" statement in the Confrontation Clause context. *See Nelson v. O'Neil*, 402 U.S. 622, 629-30 (1971) (holding that confrontation rights were satisfied where a police officer testified that a codefendant had implicated the defendant and where the codefendant testified on his own behalf and was available for cross-examination); *see also Green*, 399 U.S. at 162 ("[W]here the declarant is not absent, but is present to testify and to submit to cross-examination, our cases, if anything, support the conclusion that the admission of his out-of-court statements

does not create a confrontation problem."); *cf. Chambers v. Mississippi*, 410 U.S. 284, 302-03 (1973) (holding that defendants are entitled to cross-examine even their own witnesses).

The Sixth Amendment provides tools for a defense, not the means for defendants to manipulate witnesses and then bluff their way to acquittal.

### B. Victims of domestic violence are typically motivated by concerns for safety

Domestic-violence victims respond to abuse in many different ways, including complying with the abuser's demands, talking to the abuser, escaping from the abuser, soliciting help from friends, and calling the police. *See* Mary Ann Dutton, *Understanding Women's Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome*, 21 Hofstra L. Rev. 1191, 1227-29 (1993). The victim may consider many factors in choosing how to respond, including the effectiveness for ending the violence and the likelihood that the violence might increase. *See id.* at 1228. Society commonly expects that an abuse victim should call the police. However, empirical data show that most domestic-violence victims do not call the police, and that even when the police are called, the outcome is not always positive. *See id.* at 1229. For these reasons, emergency first-responders may need to be more persistent with domestic-violence victims in order to determine if anyone has been injured, to assess whether any danger remains, and to gauge how to defuse the situation.

Thus, the Court should not be impressed by Petitioner's observation that Amy Hammon's first response to Officer Mooney was to deny that anything was the matter, or that Officer Mooney approached Amy a second time in order to understand the situation. *See* Pet. Br. 33-34. Repetitive,

even intensive, questioning of the victim in this context would in no way be reminiscent of the inquisitorial abuses that the Framers intended to prevent; rather, it would reasonably relate to securing the victim's immediate safety. Accordingly, initial victim statements in domestic-violence emergencies are even less likely to be "testimonial" than initial victim statements in other emergencies.

More or less, studies show that victims of domestic violence are prone to recant their initial stories or to refuse to cooperate after they initially provide information to the police. *See* Lininger, 91 Va. L. Rev. at 768. Refusals to cooperate or assist with prosecution are generally based on fear of retaliation, emotional attachment to the batterer, financial dependence, concern for children and family cohesion, and religious views of relationships. *See id.* at 769-71. The fact that victims often recant and "work against their supposed self-interest" demonstrates that "it is unlikely that the primary reason victims call for help is to generate incriminating evidence rather than to stop the current violence." *See* Andrew King-Ries, *Crawford v. Washington: The End of Victimless Prosecution?*, 28 Seattle U. L. Rev. 301, 325 (2005). Thus, in the event that the Court concludes—as it should not—that the declarant's subjective motivation for making a statement is relevant to whether that statement is "testimonial," it should bear in mind that when a battered spouse does make a report to the police, it is typically to get help, not to get justice.

## V. Amy Hammon's Oral Statements to Officer Mooney Were Not "Testimonial"

The main test for determining if a statement is "testimonial" is the resemblance test. To be "testimonial," a statement must be given in formal circumstances bearing some resemblance to the abuses that gave rise to the Clause, including in response to an interrogation. The corollary, the

immediate-safety rule, is that where a statement responds to questioning that is reasonably related to an objectively reasonable concern for the immediate safety of persons or property, the statement is not "testimonial." These rules, like nearly every legal rule, may well lead to some difficult cases at the margins. This is not one of them.

1. When Amy Hammon told Officer Mooney that her husband had beaten her, she was in the living room of their home, not under oath in a courtroom, secluded in a stationhouse, or even meeting at a prearranged time in an office conference room with a court reporter. *See* J.A. 17. Officers Mooney and Richardson had been dispatched to the Hammon home not to investigate a known crime, but to provide emergency assistance, *see* J.A. 9-10, which is not the sort of magistrate activity that led to civil-law abuses. *See Crawford*, 541 U.S. at 51.

On the front porch of the house, Officer Mooney asked whether "there was a problem" and if "anything was going on." J.A. 14. Amy Hammon answered "No," but her body language told Officer Mooney a different story. *See* J.A. 14-15. Because Amy Hammon was so obviously frightened, and *because he was concerned for her safety*, Officer Mooney asked permission to enter the house, which she granted. *See* J.A. 14, 25.

After Mooney surveyed the house in disarray, Amy Hammon eventually offered her description of the day's attack, including being thrown to the ground and being beaten on the chest as well as having her face shoved into broken glass. *See* J.A. 17-18. Significantly, however, while the Indiana Supreme Court assumed that Officer Mooney asked Amy Hammon at least one more question after entering the Hammon home, J.A. 82, there is no evidence in the transcript that he did so. The transcript shows only that, upon entering the home, Officer Mooney (1) observed

disarray, including the broken glass, flaming heater, and children; (2) asked Petitioner if everything was okay and if he and Amy Hammon had argued; and then (3) "proceeded to the living room where Amy was located to speak with her." *See* J.A. 16-17. Amy Hammon's statement followed immediately. *See* J.A. 17. While it may seem reasonable to assume that Officer Mooney at that point would have again asked Amy Hammon what had occurred, the transcript does not support the notion that any extensive questioning took place.

2. To say the least, this is not evidence that in any way establishes a resemblance with civil-law inquisitorial abuses. The only documented questions that Officer Mooney asked of Amy Hammon (whether "there was a problem" and if "anything was going on") were not "tactically structured" to elicit incriminating details, and the response to it incriminated no one in any event. The Indiana Supreme Court accurately described the activities of Officers Mooney and Richardson as "assessing the scene," *see* J.A. 104, and history does not suggest that the Framers were concerned about voluntary witness disclosures to authorities at the scene of a crime. It shows they were concerned about employment of tactics from the Inquisition and the Star Chamber. *See Crawford*, 541 U.S. at 43-49. But Officers Mooney and Richardson did not play the Privy Council, and Amy Hammon was no Lord Cobham. She was just one more deeply conflicted victim of a domestic attack who reached out when help arrived.

3. Furthermore, Officer Mooney's actions pass the "immediate-safety" test: they reasonably related to Amy Hammon's immediate safety and that of her children. When Officer Mooney rejoined Amy Hammon in the living room, he did not yet know what had happened, or whether it was still happening. He did not know, for example, whether Amy Hammon or her children needed protection, whether

there were weapons or other adults in the house that could pose a danger, or an infinite variety of other facts relevant to the situation he had observed. When Officer Mooney approached Amy Hammon for the second time, in short, he had evidence from which he could reasonably infer that some type of immediate threat existed, and he needed information to know how best to address that threat. Amy Hammon's oral statements reasonably imparting that information are, therefore, not "testimonial."

4. Amy Hammon's affidavit, which the State concedes is testimonial, provides a useful contrast. First, the affidavit is the classic form of an extrajudicial sworn statement that the Framers sought to bar absent witness unavailability and a prior opportunity for cross-examination. In addition, while Amy Hammon's oral statements are not testimonial because of their relationship to Officer Mooney's need to assess an immediate threat of harm, the affidavit is of a wholly different character. Whatever else took place in the Hammon home that day, by the time Officer Mooney asked Amy Hammon to write down her story, he had assessed the threat, and an affidavit was not related to defusing it. After learning Amy Hammon's plight, Officer Mooney, for example, could have escorted her and her children to a shelter to escape immediate danger without procuring the affidavit. The affidavit was useful only for obtaining a criminal conviction, not for securing the immediate safety of those present. By this measure, Amy Hammon's affidavit was "testimonial," but her oral statement was not.

## CONCLUSION

The judgment of the Indiana Supreme Court should be affirmed.

Respectfully submitted,

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Dated: February 2, 2006

No. 05-5705

OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The
# Supreme Court of the United States

HERSHEL HAMMON,

*Petitioner,*

v.

STATE OF INDIANA,

*Respondent.*

**On Writ Of Certiorari To The Indiana Supreme Court**

## REPLY BRIEF OF PETITIONER HERSHEL HAMMON

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## TABLE OF CONTENTS

**Table of Authorities** ..... ii

**I. Introduction: The Intelligible Confrontation Clause** ..... 1

**II. Affirmance Would Countenance a System of Testifying by Making an Accusation to a Police Officer.** ..... 2

**III. A "Resemblance" or "Formality" Theory is Fallacious..** ..... 5

**IV. Petitioner's Confrontation Right Cannot Be Defeated by Characterizing the Accusation as a Response to Emergency Questioning..** ..... 11

**V. Domestic Violence, Like Other Crimes, Must and Can be Prosecuted in Accordance with the Constitution..** ..... 17

**Conclusion** ..... .20

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Note: All websites cited in this brief were last visited March 8, 2006.

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Art. I, § 9 ..... 12

Amend VI ..... passim

**STATE STATUTES, RULE, AND BILL**

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## I. Introduction: The Intelligible Confrontation Clause

When this Court "make[s] the constitutional bases for decision understandable to the public," it helps "to ensure the continuing accessibility of the Constitution to the People." Thus, it "serve[s] our commitment to being an intelligent democracy," in which the Justices of this Court are "'teachers in a vital national seminar'" and the "original and ultimate authority of [this] Court in expounding the Constitution lies . . . with a People thus educated." JOSEPH GOLDSTEIN, THE INTELLIGIBLE CONSTITUTION: THE SUPREME COURT'S OBLIGATION TO MAINTAIN THE CONSTITUTION AS SOMETHING WE THE PEOPLE CAN UNDERSTAND 112 (1992) (quoting in part Eugene V. Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193, 208 (1952)).

The position advocated by Petitioner plainly advances this goal of intelligibility. Petitioner contends that the Court can decide this case by adopting a simple and intuitively appealing principle: A statement made to a known police officer and accusing another person of a crime lies at the core of concern of the Sixth Amendment's guarantee that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."

In contrast, the Respondent State of Indiana and its supporting *amici* offer a range of theories noteworthy for their variety and complexity. The State and *amici* have spent enormous energy searching for a theory that would justify admissibility of accusations like the one made in this case. (They recognize that the theory of the Indiana Supreme Court is inadequate; the State expressly rejects it, and none of the *amici* endorse it.) But all this effort has failed to produce a conception that would make the Confrontation Clause intelligible to ordinary citizens. That in itself suggests that the result they advocate is inconsistent with the majestic and straightforward language of this provision of the Bill of Rights. And analysis confirms that all their diverse approaches lack merit.

## II. Affirmance Would Countenance a System of Testifying by Making an Accusation to a Police Officer.

Petitioner's argument is built upon a simple and sturdy framework. The Confrontation Clause is not a prohibition of a single disfavored practice but rather an affirmative guarantee of the conditions under which testimony against an accused must be given: face-to-face, with an opportunity for cross-examination. Accordingly, a state may not develop a system in which a witness may testify in any other way – for example, by speaking in private with a police officer. And clearly, states will be free to do just that if this Court holds that Petitioner may be convicted on the basis of the accusation made by Mrs. Hammon to Officer Mooney.

Indeed, taking advantage of the laxity that marked Confrontation Clause doctrine in recent years before *Crawford v. Washington*, 541 U.S. 36 (2004), states have already created such a closed-door system of testimony. That is obvious on the face of the matter: A reasonable complainant reporting a violent crime to the police understands that the report will likely generate an official response.[1] But if there were doubt about the nature of the system that the states have created, it would be removed by the extensive publicity efforts that governmental and non-governmental agencies have made. Calls to 911 or to

[1] *Amicus* National Association of Counsel for Children (NACC), Br. at 16 n.9, cites Robert Apsler et al., *Perceptions of the Police by Female Victims of Domestic Partner Violence*, 9 VIOLENCE AGAINST WOMEN 1318, 1326 Tbl. 1 (2003), for the proposition that only 1/3 of those reporting domestic violence incidents in that study wanted arrest. This is factually incorrect and misleading. The question of what action the caller wanted was posed to only about 2/3 of the 95 subjects in the study; 31 (about half) said they wanted arrest and 36 said they wanted to obtain or enforce a restraining order. *Id.* at 1323-24, 1326. It thus appears likely that most, and perhaps virtually all, wanted at least one form of official response. Further, the study is vague as to the kinds of incidents involved; it appears probable that only a perceived violation of a restraining order, and no battery, prompted many of the calls. Finally, the material question is reasonable anticipation, not desire.

the police reporting domestic violence are often not merely spontaneous responses; potential victims are advised to make careful *preparations* to call in case of a violent incident.[2] And, in large part *for the purpose of preparing a criminal case or seeking other legal sanctions against an alleged abuser*, agencies urge that actual victims place such calls and make detailed statements to responding officers.[3] Obviously, it is

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[2] For example, in a widely adapted "personalized safety plan" developed by the Metro Nashville Police Department, potential victims are advised to be prepared to call 911, to keep change for telephone calls at all times, to avoid using credit cards for calls, and to teach their children to call the police and fire departments. *E.g.*, Connecticut Coalition Against Domestic Violence, *Personalized Safety Plan*, <http://www.ctcadv.org/Website/personalized_safety_plan__below_.htm> (All websites cited in this brief were last visited March 8, 2006.). Some agencies offer cell phones that will only call 911. *E.g.*, The Safe Home, *Personalized Plan*, <http://www.thesafehome.org/Completed/personalized_safety_plan.htm>. *See also* People v. Cortes, 781 N.Y.S.2d 401, 405 (N.Y. Sup. 2004) ("the New York City Police Department is not alone in preparing the public to use 911 calls to report crimes. Sources tell people what information will be requested by the emergency operator").

[3] *See, e.g.*, Women's Justice Center, *The Greatest Escape. Special for Victims of Domestic Violence*, <http://www.justicewomen.com/tips_escape.html> ("The tape recording of your 911 call is frequently a key piece of evidence in your case. So keep talking! Don't hang up!"); Alternatives to Violence of the Palouse, Inc., Domestic Violence, <http://community.palouse.net/ATVP/Pages/Information_Pages/DomesticViolence.html> ("When the law enforcement officers arrive at your house, show them any legal or court papers you may have . . . . The law enforcement officers will listen to you and make a written statement. Tell the law enforcement officers what happened, and give them as much detail as possible. They will write down, or tape record, what you say. If you have any injuries, tell the officers so photographs can be taken."); North Brunswick (N.J.) Domestic Violence Response Team, *Love Shouldn't Hurt*, <http://www.northbrunswickonlinecom/police/dvinfo.html> ("SHOULD I CALL THE POLICE? YES! . . . [T]he police must respond to your calls . . . . Among other things, the police must write a report. Be sure to tell the officer all the details. . . . THE POLICE MUST ARREST YOUR ABUSER AND SIGN A COMPLAINT IN THE FOLLOWING SITUATIONS . . . ."); BlackWomensHealth, *Domestic Violence: When Love Becomes Hurtful*, <http://www.blackwomens

important and beneficial for crime victims to call 911 or the police, to be prepared to do so in advance, and to give detailed information when they do. But it is also obvious that if an

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health.com/domestic_violence.htm> ("Domestic violence is a Federal crime. Call 911 immediately. This will >activate the criminal justice system in regards to your domestic violence abuse and injurious claims."); Ada County Prosecutor, *Domestic Violence Unit*, <http://www.adaweb.net/departments/prosecutor/DomesticViolenceUnit.asp> ("[R]eport domestic violence to the police as soon as possible. Make every effort to preserve any evidence of the crime and share that evidence with the police."); National Clearinghouse on Abuse in Later Life, *Frequently Asked Questions*, <http://www.ncall.us/> ("What happens if I call the police? . . . [A]n investigation will immediately begin. If the police feel a victim is in immediate danger of harm, they will go to the residence to investigate the situation. They will interview the alleged abuser, victim and any witnesses. They will take pictures of any bruising or injuries. They will collect any physical evidence, including statements made by the alleged victim, abuser or the neighbors. . . . The reports from the law enforcement officers will then go to the prosecuting attorney . . . . "); California Courts, *Self-Help Center*, <http://www.courtinfo.ca.gov/selfhelp/protection/dv/respolice.htm> (advising callers to tell arriving police as much as possible about, *inter alia*, what happened, who caused injury, if a restraining order was violated, past violence, and to ask them to take pictures showing injury); Illinois Coalition Against Domestic Violence, *How Can I Help to Get the Abuser Convicted of a Crime Committed Against Me?*, <http://www.ilcadv.org/legal/e_based_prosecution.htm> ("Seek Medical Attention Immediately. Tell the emergency room personnel what happened to you. . . . Make a Police Report because it will become evidence of the abuse . . . . The police should gather the evidence of the abuse at the scene. . . . Evidence includes . . . the names and statements from anyone who heard or saw the attack."); Oakland County Coordinating Council Against Domestic Violence, *Domestic Violence Handbook*, <http://www.domesticviolence.org/safe.html> ("[W]hen the police come, . . . [t]hey can arrest your abuser when they have enough proof that you have been abused. . . . [T]ell them everything the abuser did that made you call. . . . Show them any marks left on your body. . . . If you see a mark after the police leave, call the police to take pictures of the marks. They may be used in court. . . . Police reports can be used in court if your abuser is charged with a crime."); Familydoctor.org, *Domestic Violence: Protecting Yourself and Your Children*, <http://familydoctor.org/052.xml> ("Call the police if you think you can't leave home safely or if you want to bring charges against your abuser.").

accusation made to the police is acceptable proof even though the complainant never confronts the accused, then we have countenanced a new form of prosecution testimony. That is, a state can secure a conviction on the basis of an accusation by a complainant who understood as she was making it that it would likely be used by the legal system against the person she accused.

Nor is this development limited to accusations made in the immediate aftermath of the incident; indeed, states have passed statutes *designed* to authorize admission at trial of accusatory statements that have been recorded, in writing or electronically, or made to law enforcement officers, even a considerable time after the incident.[4] Plainly, only a decision by this Court will ensure that this Nation adheres to the traditional, and constitutionally mandated, method by which prosecution witnesses give testimony.

**III. A "Resemblance" or "Formality" Theory is Fallacious.**

Many of the arguments raised by the State and supporting *amici* share a common fallacy: To determine what is testimonial within the meaning of *Crawford*, they begin with the formal methods that have been used by judicial systems and ask whether a given practice sufficiently "resembles" them. Under this family of theories, the Confrontation Clause prohibits only formal practices that "resemble" certain inquisitorial methods of securing testimony that were extant at the time the Clause was adopted. Although resemblance of a given practice to inquisitorial processes that were known and disapproved by the Framers is *sufficient* to demonstrate that such a practice is covered by the Clause, *see Crawford*, 541 U.S. at 50-53, the

[4] *See* Ore. Rev. Stat. 40.460(26)(a) (24-hour limitation); Cal. Evid. Code § 1370; Michigan Legislature, Senate Bill 0263, <http://www.legislature.mi.gov/(33isqk55vhg1cs45dedraz55)/mileg.aspx?page=BillStatus&objectname=2005-SB-0263> (tracking progress of bill, similar to Oregon legislation, that has passed both legislative houses, in slightly different forms).

theory that such resemblance is *necessary* for the Clause to apply is fallacious on several grounds.

*First*, the Clause is an affirmative *guarantee* of a particular practice, not a prohibition of a particular disfavored practice. The Clause does *not* say: "In criminal prosecutions, testimony secured by inquisitorial processes such as those used in civil law systems shall not be allowed." Rather, it provides that "[i]n *all* criminal prosecutions, the accused shall *enjoy* the *right* . . . *to be confronted* with the witnesses against him" (emphasis added).

*Second*, the history behind the Clause confirms that it was meant not simply to prevent one form of testimony but rather to ensure adherence to the long-established method of giving prosecution testimony in a common-law court – face-to-face with the accused.

For centuries before adoption of the Confrontation Clause, the hallmark of a common-law criminal trial was a lawyer-free "altercation" between accuser and accused.[5] The accuser – who in the vast majority of cases was the prosecutor or prosecutrix, because there was no public prosecutor as we know it – thus had to appear at trial and testify; if he or she did not, the case ordinarily could not go forward. The Old Bailey Sessions Papers, a valuable resource on which some *amici* rely, reports approximately 2000 cases between 1684 and 1834 in which the prosecutor or prosecutrix did not appear. Thorough searching has yielded only one in which the accused was convicted – and there because he had previously confessed.[6]

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[5] THOMAS SMITH, DE REPUBLICA ANGLORUM 114 (Mary Dewar ed., Cambridge Univ. Press 1982) (1583); JOHN H. LANGBEIN, THE ORIGINS OF ADVERSARY CRIMINAL TRIAL 13 (2003).

[6] A search of <http://www.oldbaileyonline.org/search/crime/> for cases in which there was a "Specific Verdict" of "Prosecutor not present" yields a list of 1932 cases. If the search is further confined by asking for a "General Verdict" of "Not guilty," the same list appears. But if instead the search is confined by asking for a "General Verdict" of "Guilty," no cases are listed.

It was thus not the rule against hearsay, which was still rudimentary at the time of the Framing,[7] that prevented a prosecution case from being based on secondary reports of an accusation, but rather a fundamental understanding of how criminal prosecutions must be presented at trial. The attempts on the state's side to find exceptions to the confrontation principle only underscore how strong it was and how weak their arguments are. *Amicus* NACC offers cases in which secondary reports of accusations by children were admitted, Br. at 19-21, but as NACC recognizes, Br. at 22 n.13, young children were not deemed competent witnesses. Thus, their statements could not be regarded as testimonial in nature[8] – until *R. v. Brasier*, 1 Leach 199, 168 E.R. 202 (K.B. 1779), changed the rules, holding

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The one case of which Petitioner is aware in which the accused was found guilty notwithstanding the failure of the prosecutor to appear was *R. v. Selbey*, t17540424-16, <http://www.oldbaileyonline.org/html_units/1750s/t17540424-16.html> (1754). Selbey had confessed before the Justice of the Peace. The above-described search did not reveal this case, because the code "Prosecutor not present" was omitted by mistake from the online version of it. This case, as well as some others for which the coding was mistakenly omitted, may be found by searching for common phrasings that expressed the absence of the prosecutor or prosecutrix. Thus, a search for "prosecutor did not appear" produces a total of 567 cases, of which 31, including *Selbey*, should have the coding but do not.

[7] 12 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 509 n.7 (1938) (quoting Edmund Burke as saying in 1794 that a parrot could recite hte law of evidence in five minutes).

[8] These cases appear therefore to illustrate a more general principle that courts would be receptive to out-of-court statements by declarants who were incompetent to testify at trial. *See* LANGBEIN, ORIGINS, *supra*, at 238. The same consideration undercuts the attempt of *amici* Illinois et al., Br. at 10, to shrug aside the fact that *Thompson v. Trevanion*, Skin. 402, 90 Eng. Rep. 179 (K.B. 1693), their only pre-Framing authority for an excited utterance doctrine, was a civil case. As a civil party, the declarant there was disqualified for interest, 2 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 575, at 799-808 (James H. Chadbourn, rev., 1979); had she been prosecutrix in a criminal case, of course, her testimony would have been essential.

that sufficiently mature children could testify at trial, characterizing the out-of-court accusation made by the child there as testimonial,[9] and so excluding it.[10] The United States cites two "assault" cases, Br. In *Davis v. Washington*, No. 05-5224, at 25 n.4 – a misleading reference, because both were murder cases, and so the statements could easily be considered dying declarations, admissibility of which, Petitioner contends, Br. at 21 n.21, is best justified on forfeiture grounds.

To child-victim and homicide cases might be added cases in which out-of-court statements "supplemented sworn testimony." LANGBEIN, ORIGINS, *supra*, at 238.[11] But neither the State nor any of its supporting *amici* has cited *a single case* before the Framing or for decades after in which an accused was convicted on the basis of an accusation made out of his presence by a complainant who could have testified at trial but did not. Nor is Petitioner aware of any such cases. A conviction could not be based upon testimony by a constable of an accusation made behind closed doors.[12]

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[9] It is this characterization, not representing a change of law but rather a non-controversial understanding that (putting aside the age of the child) the accusation was testimonial in nature, for which Petitioner cited *Brasier* in his main Brief, at 27-28.

[10] How this history should now affect admission of statements made by children is, of course, a question that this Court need not reach here. Other considerations as well, not presented here, might affect how the confrontation right is applied with respect to child witnesses. *See, e.g.*, Sherman J. Clark, *An Accuser-Obligation Approach to the Confrontation Clause*, 81 NEB. L. REV. 1258, 1280-85 (2003).

[11] An illuminating case in this connection is R. v. Brandan, t17810222-46, <http://www.oldbaileyonline.org/html_units/1780s/t17810222-46.html> (1781). A witness, probably a constable, testified to an accusation made by the prosecutor, presumably to save time while waiting for him to appear – which he did not, and so the case was dropped without further ado.

[12] *E.g., R. v. Radbourne*, 1 Leach 457, 168 E.R. 330, t17870711-1, <http://www.oldbaileyonline.org/html_units/1780s/t17870711-1.html> (1787) (constable could not testify as to an accusation made by the victim "when the prisoner was not there"). The point for which *Radbourne* is cited

*Third*, it makes no sense to construe the Clause to prohibit forms of testimony that resemble those that were used by the great civilizations of Western Europe and to have no force at all when an accusation is made in any other manner, even in a complete absence of procedural protections. The whole point of the Confrontation Clause is to *ensure* that testimony will occur at trial, or some other formal proceeding offering such protections. But if the State is correct, a witness desiring to make an accusation and not confront the accused could do so in any number of ways. She could write a letter to the court, or send a message over the internet,[13] or make a videotape in private, perhaps with the help and at the urging of a victims' support organization, or initiate a conversation with a police officer, who could report to the court his recollection of what she said, and the Confrontation Clause would pose no obstacle at all.

To the extent they acknowledge this issue, the State and *amici* suggest either that bodies of law other than the Confrontation Clause should deal with it – which is patently inadequate[14] – or that such wide-open accusatorial systems pose no problem because the Clause is concerned only with prosecutorial abuse. This argument completely misunderstands the nature of the confrontation right.

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here has nothing to do with the question whether examinations pursuant to the Marian statutes (which the Confrontation Clause disapproved. *Crawford*, 541 U.S. at 50) could be introduced at trial though not taken in the presence of the accused. *Cf.* Br. of Illinois et al., at 14-15. *See also R. v. Woodcock*, 1 Leach 500, 168 E.R. 352 (1789) (usual mode of evidence is testimony on oath before jury, court, and accused, subject to cross-examination, but two other species are allowed, dying declarations and testimony pursuant to Marian statutes).

[13] The suggestion is not fanciful. *See* Domestic Violence Victim Information Center, *Victim Impact Statements*, <http://phoenix.gov/VICTIMSDV/dvimpact.html> (encouraging domestic violence victims to make statements online, or by letter or audio or video tape, for sentencing purposes).

[14] *Amicus* National District Attorneys Association, Br. at 27-28, attempts to wish the problem away by suggesting that state law might deal with these problems.

Notwithstanding the rather startling contention by *amicus* Cook County, Br. at 13-14 n.3, law enforcement officers do not violate the confrontation right, even when they take an *ex parte* statement from a witness. Good investigation often *demands* that they do so, and they even have valid reasons for taking formal statements – for example, for impeachment purposes. The Confrontation Clause is violated only when *the court* allows a testimonial statement to be used to convict an accused without his having had a chance to "be confronted with the witnesses against him."[15]

*Fourth*, a resemblance or formality theory gives law enforcement officials inappropriate incentives and invites manipulation by them. It is not hard to predict what will happen if the rule is that statements made in response to police questioning are inadmissible if but only if the questioning is formal: Questioning will tend to be conducted informally, and conviction will often depend on a police officer's rendition of what the complainant told him orally.[16]

*Fifth*, a resemblance or formality test is vulnerable to distortion. This case is a good example because, ironically, only by distortion could the accusation here be admitted under such a test. In *all critical respects*, the questioning here resembles the old inquisitorial practices: It is questioning by a law enforcement

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[15] That conduct by the court also constitutes state action for purposes of the Fourteenth Amendment, which incorporates the Confrontation Clause.

[16] Similarly, note the inappropriate incentive that would be created by exempting "excited utterances" from the Confrontation Clause. To get crucial information from a domestic violence caller who is in a distressed state, a 911 dispatcher should "try to calm the person down and ask the necessary questions." New Jersey Division of Criminal Justice, *Handling a Domestic Violence Call: In-Service Training for Police Dispatchers*, <http://www.njpdresources.org/dom-violence/dv-dispatcher-instr.pdf>; Women's Justice Center, *The Greatest Escape*, *supra* ("911 operators . . . are trained to help you stay calm."). And yet, as petitioner Davis points out, Rep. Br. at 3, dispatchers are often told *not* to calm the caller down, to save the "excited utterance" exception.

officer, out of the presence of the accused and of the court, designed to elicit incriminating information. The questioning constituted police interrogation, *cf. Rhode Island v. Innis*, 446 U.S. 291, 301 (1980) ("any words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response"), though that characterization is not necessary for the accusation to be deemed testimonial.

Consider the particular test proposed by the State, whether the statement was made in response to "formal, coercive, tactically structured police questioning." Br. at 9. First, it is difficult to imagine a situation more coercive for a woman than being questioned by an armed, uniformed police officer, J.A. 24, who appears unready to leave the woman's home, at least without her children, J.A. 59, until he hears what he wants. Second, the questioning here was structured in accordance with common protocols.[17] Finally, in accordance with the officer's usual practice, the oral questioning was part of a continuous pro-cess by which he secured the formal, written affidavit. J.A. 2, 18.

## IV. Petitioner's Confrontation Right Cannot Be Defeated by Characterizing the Accusation as a Response to Emergency Questioning.

The United States argues at length that "statements made to officials faced with an apparent emergency, and who ask

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[17] Such protocols recommend that two officers come to the scene and that they separate the parties to the dispute. *See, e.g.*, American Prosecutors Research Institute (APRI), *Preparing a Domestic Violence Case*, <http://www. ndaa-apri.org/apri/programs/vawa/ dv_101.html#preparecase> ("Separate the victim and the suspect before you interview either of them . . . ."); *Ohio Model Protocol for Responding to Domestic Violence*, <http://www.odvn.org/ PDFs/Protocoltexonly.pdf> (rev. ed. 2003), at 6 ("[W]henever possible, dispatch two officers to the scene"), 12 ("Separate the victim . . . and the alleged offender . . . and conduct separate interviews . . . in separate locations"). Further, Officer Mooney, not having secured an accusation in his first encounter, gathered more information and tried again, this time successfully.

questions reasonably necessary to resolve that emergency, are not 'testimonial'." *Amicus* Br. of United States at 5. Similarly, the State argues that statements "made in response to police actions or questions reasonably related to an objectively reasonable concern for the immediate safety of any persons or property" are not testimonial. Resp. Br. at 9. The argument is completely unavailing, for several reasons.

*First,* it runs counter to the text of the Confrontation Clause. There is, of course, no emergency exception to the Clause. *Compare* Art. I, § 9, cl. 2 ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.").

*Second,* there is no historical support for the argument. Neither the State nor the United States presents any cases in which statements that would otherwise invoke the confrontation right were deemed not to do so on the ground that they were made in response to emergency questioning.

*Third,* the argument does not square with a sound conception of the confrontation right. Whether a statement is deemed testimonial should be judged from the perspective of a reasonable person in the position of the declarant. If a reasonable person in that position would fully anticipate that her statement would be used in investigation or prosecution of a crime, the statement is testimonial, irrespective of whether it was made in response to questioning designed to resolve a real or apparent emergency, or indeed of whether it was made in response to any questioning at all. Suppose a police officer comes to the scene of a reported crime and asks an apparent victim, "What happened? It's important that we know quickly so that we can protect you and others!" Under the emergency questioning theory, the response would automatically be non-testimonial – even if it were, "Officer, Jack assaulted me. I'm telling you because I expect you'll arrest Jack, pursue charges against him, and relay my accusation to court." But if the court allowed the officer to do just that, the confrontation right would

clearly be violated.

Of course, most accusers are not so articulate about their anticipation, but the question is what they might reasonably anticipate and not what they say about their anticipation.[18] The United States argues that emergency questioning does not "clearly convey to the declarant that she is giving statements for use in a legal proceeding." Br. at 5. Even if that broad assertion were true – the United States offers no support for it, and materials such as those compiled above in note 3 indicate that it is not true – it is immaterial. If the *circumstances* impart such an understanding, that is enough. And it is apparent that when one makes an accusation of a serious crime to a police officer the reasonable anticipation is that the machinery of the criminal justice system will be invoked – and all the more so if the officer is persistently inquiring about a reported incident.

*Fourth*, the emergency theory would give law enforcement officers ample opportunity to gather accusatory statements in private from willing witnesses without constraint by the Confrontation Clause. The United States argues that "[a] reasonable officer would not engage in evidence gathering before ensuring how to protect a potential victim," Br. at 11.[19] The theory appears to be that police officers dealing with what can be

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[18] Contrary to a statement by the United States, Br. at 9, Petitioner's theory, by focusing on the reasonable anticipation of a person in the declarant's position, renders statements by a conspirator to an unknown government agent as clearly non-testimonial. Pet. Br. at 14-15.

[19] The United States also argues that statements made in response to emergency questioning can have probative value independent of live testimony, Br. at 7. But this point, even if true, is immaterial. *Crawford* makes clear that if a statement is testimonial it cannot be admitted against an accused absent an opportunity for cross-examination, and high probative value cannot be a substitute. 541 U.S. at 61. Besides, the argument proves too much: *Any* statement made before trial has independent probative value, because it reflects a fresher memory than does trial testimony, but that is no basis for admitting an out-of-court testimonial statement if the witness does not testify at trial.

characterized as an emergency give no thought to the prospect of securing useful evidence (notwithstanding the fact that accusatory statements of the type involved here are, according to the State and *amici*, critical evidence in many prosecutions), but that they receive accusations as a windfall of their protective work, and immediately turn their attention to gathering evidence with the affidavit forms that they happen to have on their persons when they come to the scene – and that this scenario repeats itself again and again and again. Such recurrent amnesia on the part of police officers would be terrifying if it were plausible. But of course the reality is very different. From the moment the attention of law enforcement officers is drawn to what appears to be a crime just committed, they are engaged not only in protecting the public against immediate harm but also in the collection of evidence, including accusatory statements.[20]

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[20] Notably, officers are told to record the exact words of "excited utterances." *E.g.*, NATIONAL VICTIM ASSISTANCE ACADEMY TEXTBOOK, <http://www.ojp.usdoj.gov/ovc/assist/nvaa2002/chapter9.html> (2002) ("Record 'excited utterances' (excited statements made by victims or witnesses at the critical stage immediately following the arrival of law enforcement), which may be allowed into court as exceptions to the rule against hearsay"); APRI, *Preparing a Domestic Violence Case, supra* ("Excited utterances should be written in quotes in the report to indicate that they are the victim's exact words."); National Advisory Council on Violence Against Women, *Toolkit to End Violence Against Women*, ch. 4, <http://toolkit.ncjrs.org/files/fullchapter4.pdf>, at 2 (advising implementation of "standardized, comprehensive guidelines and tools for collecting evidence," including 911 tapes and "excited utterance statements"); George Wattendorf, *Focus on Domestic Violence: Prosecuting Cases Without Victim Cooperation*, <http://www.fbi.gov/publications/leb/1996/apr1964.txt> (1996) ("It is important that officers document the victim's condition and note her exact statements concerning the assault. Officers can testify to such remarks as, 'He punched me!' under the excited utterance exception."); Maine Department of Public Safety, *Domestic Violence Response: Best Practices for Law Enforcement in Maine*, <http://mainegov-images.informe.org/dps/mcja/whats_new/DV%20 best%20practices.pdf> ("Locate parties upon arrival and *separate them*"). ("*Note excited utterances* – exact words by all parties"); *Law Enforcement Response to Violence Against Women*,

*Fifth*, an emergency doctrine distorts police incentives. If the rule is that an accusation can be good evidence if and only if it was made while an emergency appeared to exist, then officers have an incentive to preserve the existence, or at least the appearance, of an emergency until they secure the desired accusation.

*Sixth*, "emergency" is a notoriously flexible concept. The questions of whether an emergency should be deemed to exist – and how long it should be deemed to last – are easily manipulated.[21] And of course the problem is aggravated by speaking, as the United States does here, of "apparent" emergency.

Indeed, only by distorting the concept of emergency can it be stretched to reach the oral accusation made by Mrs. Hammon. By the time she made the accusation – a considerable, and unknown, time after the incident it purported to describe – she was protected by two police officers, one accompanying her and the other accompanying Petitioner. J.A. 81-82. No harm to her

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<http://www.mc.maricopa.edu/dept/d52/ajs/vaw/911.htm> ("An excited utterance statement recorded on a 911 call (or heard by a law enforcement officer in the field) can be an important prosecutorial tool. Because the victim may not appear for trial or may appear and change their statement, it is important to record words made by the victim that qualify as an excited utterance. This is an exception to the hearsay rule in the Rules of Evidence . . . ."); *New York State Domestic Incident Report Reference Manual*, <criminaljustice.state.ny.us/ojis/documents/new_%20dir_trainingmanual_letter_120605.doc> ("**WERE EXCITED UTTERENCES** [*sic*], **SPONTANEOUS ADMISSIONS OR SPONTANEOUS STATEMENTS MADE?** Mark off Yes or No. If 'YES,' write down your notes about any important statements about the incident by the victim (e.g. 'I'm afraid for my life.') . . . Your notes on victim statements may be critical for the establishment of 'excited utterances' .").

[21] When the question is whether a particular police practice is legitimate, then the question of imminence may nevertheless be an essential aspect of the inquiry; a practice that ordinarily would not be tolerated might become acceptable, and even meritorious, in sufficiently exigent circumstances. But the question here is not the validity of police practices. Assuming Officer Mooney was not coercive, he did nothing wrong (and the State does not suggest that coercion would have been proper).

was potentially imminent. The contention that there was an emergency therefore reduces to the possibility that harm could occur *if* the officers left the house. U.S. Br. at 13. But if that is enough to constitute an emergency, then there is an emergency *whenever* a person suspected of a violent crime is at large, or might be if the police leave him at liberty.[22]

That the questioning that prompted Mrs. Hammon's oral accusation[23] cannot be fairly described as an attempt to resolve an emergency is confirmed by the fact that, *in accordance with his usual practice*, the *very next thing* that Officer Mooney did after procuring the accusation was to solicit an affidavit to the same effect. J.A. 18.

Moreover, the State and the United States concede, as they must, that the affidavit was testimonial – but given that the officers had taken no further steps to prevent "present or imminent risk of harm to an individual or the public," U.S. Br. at 7, how was the affidavit less a response to emergency questioning than the oral accusation? The United States says that the solicitation of the affidavit communicated an intent to use the statement for legal purposes, Br. at 14, which of course

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[22] Thus, the United States fails in its attempt to distinguish *R. v. Brasier*, 1 Leach 199, 168 E.R. 202 (1779), on the ground that in that case the statement by the alleged victim "was made immediately after she arrived home." U.S. Br. in *Davis*, at 27. Left unprotected, the child might have gone outside and made herself vulnerable to a renewed assault; left unapprehended, the suspect may have assaulted another child.

[23] In order to support its "emergency" theory, the United States dances a fine line: It characterizes the statement as in response to questioning, Br. at 13-14 n.3 (because otherwise the theory could not apply) but not to interrogation (because otherwise it would fit within one of the core categories enumerated by *Crawford*, 541 U.S. at 51-52). Faced with the same dilemma, the State also equivocates, saying that "it may seem reasonable to assume that Officer Mooney at that point [when he spoke the second time with her] would have again asked Amy Hammon what happened," but that "the transcript does not support the notion that any extensive questioning took place," and that in fact "there is no evidence in the transcript" that he asked even one question at that point. Br. at 44-45.

is true. But notice that in the United States's view an important factor in making emergency questioning non-testimonial is that it does not make such communication, and the affidavit is deemed not to be in response to emergency questioning because it was accompanied by such communication. To the extent that the argument is not circular, it is therefore simply a variation of a formality theory. The United States also appears to argue that only after Mrs. Hammon made the oral accusation did the officers have enough information to know "how to resolve" the emergency. Br. at 15. But that "resolution" was to solicit the affidavit and then *arrest* Petitioner; clearly, that was the point of the preceding questioning. Further, the officers had ample reason beforehand to believe that Petitioner had committed a battery. *See, e.g.*, U.S. Br. at 12-13. What they did not have, what apparently they would not leave the house without (as Mrs. Hammon must have realized), was an explicit accusation, without which there would have been insufficient evidence to prove guilt beyond a reasonable doubt.

Petitioner does not mean to cast doubt on the good faith of Officer Mooney, or to suggest that he did not have concerns for the safety of Mrs. Hammon and others. Assuming *arguendo* that he did not act coercively, he did nothing wrong. But plainly the questioning that led to Mrs. Hammon's oral accusation was part of a process of gathering evidence, which culminated in accordance with the officer's usual practice in the solicitation and preparation of an affidavit.

## V. Domestic Violence, Like Other Crimes, Must and Can be Prosecuted in Accordance with the Constitution.

Much of the effort on the State's side is directed at showing that accusations like Mrs. Hammon's are critical to the prosecution of domestic violence. The short answer, of course, is that domestic violence, like all crimes, must be prosecuted in accordance with the Constitution – and the Confrontation Clause

applies to "all criminal prosecutions," without an exception for domestic violence.

Until *Crawford* set the law on a proper course, this Court's decision in *White v. Illinois*, 502 U.S. 346 (1992), opened a clear channel for so-called "evidence-based prosecutions."[24] Recognizing the constitutional command in this context will no doubt have an impact on these prosecutions, but it will hardly leave prosecutors toothless. *See generally Amicus* Br. of American Civil Liberties Union, at 18-25; Tom Lininger, *Prosecuting Batterers After Crawford*, 91 VA. L. REV. 747 (2005).

*First*, with appropriate efforts, organization, and cooperation among government agents, it is possible to keep complainants safe, encourage and enable them to testify at trial, and secure convictions. Authority for this proposition may be found in a report, published by *amicus* NDAA, of a project of *amicus* Cook County, funded by *amicus* United States, through the Justice Department's Violence Against Women Project.[25]

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[24] This is a misleading term, because their defining characteristic is the critical evidence that is *not* presented, in-court testimony by the accuser subject to cross-examination.

[25] Richard Devine, *Targeting High Risk Domestic Violence Cases: the Cook County, Chicago, Experience*, 34 APR PROSECUTOR 30 (March/April 2000) (describing Target Abuse Call, which achieves goals of holding offenders accountable, with 90% conviction rate, and ensuring safety of victims, approximately 80% of whom participate in prosecution). *See also* Cook County State's Attorney's Office, *Domestic Violence: Target Abuser Call - T.A.C.*, <http:// www.statesattorney.org/dvtac.htm>; Center for Educational Media, *Snapshots of Success: Cook County, Illinois* (2001) (video).

Not all prosecutors are so conscientious. Cook County State's Attorney Richard Devine has referred to those who "serve the subpoena and walk away," Devine, *supra*, at 32. Not surprisingly, some prosecutors prefer to try a domestic violence case without the complainant testifying at trial, APRI, *DV 101*, <http://www.ndaa.org/apri/programs/vawa/dv_101.html>, ("Some jurisdictions are even finding that they are winning more cases without the victim's cooperation than they won with her cooperation."); the case is so much more unpredictable if one cannot be sure how the chief witness will testify on direct and cross-examination.

*Second*, under the doctrine of *California v. Green*, 399 U.S. 149 (1970), reaffirmed by *Crawford*, 541 U.S. at 59 n.9, the Confrontation Clause does not bar the complainant's prior statement if she testifies at trial, even if she does so inconsistently with that statement. Indiana tightly restricts the circumstances in which prior inconsistent statements are exempted from the rule against hearsay, *see* Ind. R. Evid. 801(d)(1)(A), but it is free to change that choice. *Compare* Cal. Evid. Code § 1235.

*Third*, if the complainant is able to confront the accused shortly after the incident, the State may offer a prompt deposition, or some other pre-trial proceeding providing an adequate opportunity for cross-examination. That testimony may be admitted at trial if she is unable to testify then. the earlier testimony could be admitted. *Crawford*, 541 U.S. at 54, 57.

*Fourth*, diligent prosecution can often secure a conviction without relying on a testimonial statement by the accused. As *amicus* NDAA has pointed out through its research arm, "Prosecutors win murder trials all the time without the testimony of the victim; the same is possible in assault and other domestic violence cases."[26] In this case, Mrs. Hammon's accusation was essential to the prosecution, but had the facts been slightly different – had she been bruised, which may have been expected given the State's contention that Petitioner had shoved her head into broken glass, *see* J.A. 18, 21, 29 – this may not have been so.

*Fifth*, if wrongful conduct of the accused causes the complainant to be unable to testify, then the accused should be held to have forfeited the confrontation right.[27] Contrary to a

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[26] APRI, *Preparing a Domestic Violence Case*, *supra*.

[27] Whatever the shape of forfeiture doctrine – a question not presented by this case – surely the prosecution has the burden of demonstrating on the facts of the particular case whether the accused forfeited the right. One does not automatically lose the confrontation right by being accused of domestic violence any more than by being accused of, say, organized crime. It is important in this connection to bear in mind that witness intimidation (not a factor in this case) is not limited to the domestic violence context. *See*

suggestion made by *amici* NNEDV et al., Br. at 22 n.16, Petitioner believes that a robust doctrine of forfeiture is an integral part of a sound conception of the right.[28]

*Sixth*, in some cases a state might impose sanctions if a complainant refuses to testify. The choice whether to do so is difficult, but if a state is unwilling to compel the complainant to testify, and if it cannot prove that the refusal to testify is attributable to wrongful conduct by the accused, the solution is not to disregard the accused's confrontation right.[29]

*Seventh*, because "one of the primary reasons why the criminal justice system has traditionally been ineffective in responding to domestic violence has been the relative inflexibility of treatment modalities," in some cases the most effective and appropriate response is diversion to alternative programs. EVE S. BUZAWA & CARL G. BUZAWA, DOMESTIC VIOLENCE: THE CRIMINAL JUSTICE RESPONSE 206 (2d ed. 1996); *see, e.g.*, Ind. Code 33-39-1-8 (authorizing diversion in appropriate cases).

In sum, states have available the tools to address the problem of domestic violence without need to rely on an unconstitutional option they never should have had.

## CONCLUSION

The decision of the Indiana Supreme Court should be reversed.

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*generally* MICHAEL H. GRAHAM, WITNESS INTIMIDATION: THE LAW'S RESPONSE (1985).

[28] *See, e.g.*, Richard D. Friedman, *Confrontation and the Definition of Chutzpa*, 31 ISRAEL L. REV. 506 (1997); Pet. Br. at 21 n.21.

[29] Nor is the solution to rely on the accused's right to compel witnesses in his favor. Space limitations preclude offering the many responses that could be made to this bizarre suggestion, but it is difficult to resist the observation that, given the fact amply documented in the briefs supporting the state that domestic violence is often a crime of power and control, it is singularly inappropriate to depend on the possibility that the accused will compel the complainant, whose accusation has by hypothesis already been admitted, to appear in court for hostile examination.

Respectfully submitted,

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No. 05-5705

# In the Supreme Court of the United States

HERSCHEL HAMMON, PETITIONER

*v.*

STATE OF INDIANA

*ON WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA*

## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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## QUESTION PRESENTED

Whether an assault victim's statement that she was assaulted, made in response to emergency questioning by a police officer on the scene of the assault, was testimonial within the meaning of *Crawford* v. *Washington*, 541 U.S. 36 (2004).

## TABLE OF CONTENTS


Page

Interest of the United States ..... 1
Statement ..... 1
Summary of argument ..... 5
Argument:
The victim's statement in this case was not testimonial because it was the product of emergency questioning ..... 6
A. Statements that are the product of emergency questioning are not "testimonial" under the Confrontation Clause ..... 7
B. The oral statements made by Ms. Hammon were a response to emergency questioning ..... 12
Conclusion ..... 16


## TABLE OF AUTHORITIES


Case:
*Bourjaily* v. *United States*, 483 U.S. 171 (1987) ..... 8
*Crawford* v. *Washington*, 541 U.S. 36 (2004) ..... 1, 3, 5, 6, 9, 10, 11, 14
*Mincy* v. *Arizona*, 437 U.S. 385 (1978) ..... 12
*United States* v. *Brooks*, 367 F.3d 1128 (9th Cir. 2004), cert. denied, 543 U.S. 1058 (2005) ..... 12
*United States* v. *Hadley*, 431 F.3d 484 (6th Cir. 2005) .. 11
*United States* v. *Russell*, No. 04-10681, 2006 WL 213853 (9th Cir. Jan. 30, 2006) ..... 11

Constitution and rules: Page

U.S. Const.:

Amend. IV ..... 11

Amend. VI (Confrontation Clause) .... 4, 5, 6, 7, 8, 9, 13

Fed. R. Evid.:

Rule 801(c) ..... 8

Rule 803 advisory committee's note (1972) ..... 8

Rule 806 advisory committee's note (1972) ..... 8

Ind. Code Ann., R. Evid. 803(c) (Michie 2005) ..... 3

Miscellaneous:

Noah Webster, *An American Dictionary of the English Language* (1828) ..... 14

# In the Supreme Court of the United States

No. 05-5705

HERSCHEL HAMMON, PETITIONER

*v.*

STATE OF INDIANA

*ON WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA*

**BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT**

## INTEREST OF THE UNITED STATES

This case, like *Davis* v. *Washington*, No. 05-5224, presents the question whether the rule against the admission of "testimonial" statements established in *Crawford* v. *Washington*, 541 U.S. 36 (2004), applies to statements made in response to emergency questioning. Because that question has substantial implications for the conduct of federal criminal trials, the United States has a significant interest in the Court's disposition of this case.

## STATEMENT

1. On February 26, 2003, in response to a report of a domestic disturbance, Officer Jason Mooney of the Peru, Indiana, Police Department went to the home of petitioner and his wife, Amy Hammon. J.A. 81. Mooney

was accompanied by Officer Rod Richard. J.A. 81. When Mooney arrived at petitioner's house, Ms. Hammon was on the front porch and appeared frightened. J.A. 13. When Mooney asked whether there was any problem, however, Ms. Hammon responded that "nothing was the matter" and that she was "okay." J.A. 14. Officer Mooney asked for permission to enter the house to make sure that everything was "okay," and Ms. Hammon gave her consent. J.A. 14.

On entering the living room of the house, Mooney observed a heating unit emitting flames and fragments of glass from the unit on the floor nearby. J.A. 16. Mooney then encountered petitioner and asked him what had happened. J.A. 16. Petitioner told Mooney that he and his wife had been in an argument, but that the argument had never become physical, and everything was fine now. J.A. 17. Mooney left Officer Richard with petitioner in the kitchen and returned to the living room to speak with Ms. Hammon. J.A. 17, 32.

At that point, Ms. Hammon told Mooney that she and her husband had argued about their daughter going to her boyfriend's house, that during the argument, petitioner began breaking things in the living room, including the lamp, the phone, and the heater, and that eventually petitioner pushed her down, shoved her head into the broken glass of the heater, and punched her twice in the chest. J.A. 17-18. During the course of Mooney's exchange with Ms. Hammon, petitioner tried to walk into the room, and when he did, Ms. Hammon became quiet, apparently afraid to speak. J.A. 32.

Near the end of his investigation, Mooney asked Ms. Hammon to fill out an affidavit describing what had happened, and Ms. Hammon complied. J.A. 18-20. The affidavit stated that petitioner "[b]roke our furnace &

shoved me down on the floor into the broken glass. Hit me in the chest and threw me down. Broke our lamps & phone. Tore up my van where I couldn't leave the house. Attacked my daughter." J.A. 2. The affidavit expressed Ms. Hammon's understanding that Officer Mooney was relying on the allegations in the affidavit to establish probable cause to arrest petitioner, and the affidavit was signed by Ms. Hammon and witnessed by Officer Mooney. J.A. 2-3.

2. Petitioner was charged with committing domestic battery and violating the terms of his parole. J.A. 82. The prosecutor subpoenaed Ms. Hammon, but she did not appear for trial. Over petitioner's objection, the trial court admitted as an excited utterance Ms. Hammon's statement to Mooney that petitioner had assaulted her. J.A. 83. Indiana's excited utterance exception to the hearsay rule allows the admission of a "statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." Ind. Code Ann., R. Evid. 803(c) (Michie 2005). The district court also admitted Ms. Hammon's affidavit as a present sense impression. J.A. 83. After a bench trial, petitioner was convicted of domestic battery and found to have violated his parole. J.A. 83.

3. The Indiana Court of Appeals affirmed. J.A. 66-79. The court first held that the district court did not abuse its discretion in admitting, as an excited utterance, Ms. Hammon's oral description of the assault to Officer Mooney. J.A. 68-72.

While the appeal was pending, this Court held in *Crawford* v. *Washington*, 541 U.S. 36 (2004), that the Confrontation Clause generally precludes the admission of "testimonial" hearsay unless the declarant is unavail-

able and the defendant has had a prior opportunity to cross-examine. Applying *Crawford*, the court of appeals held that Ms. Hammon's oral description of the assault was not testimonial, and its admission therefore did not violate the Confrontation Clause. J.A. 75. The court reasoned that a statement is testimonial when it has an "official and formal quality," and that Ms. Hammon's oral statement to Mooney did not have that quality. J.A. 75-76. The court further held that Ms. Hammon's oral statement to Mooney did not result from interrogation because the term interrogation does not include "preliminary investigatory questions asked at the scene of a crime shortly after it has occurred." J.A. 77. The court held that any error in admitting Ms. Hammon's affidavit was harmless. J.A. 68 n.1.

4. The Indiana Supreme Court affirmed. J.A. 80-107. The court held that Ms. Hammon's oral statement to Mooney was admissible under Indiana law as an excited utterance, because Ms. Hammon appeared frightened when Mooney arrived, and because it was reasonable to infer that Mooney arrived promptly after receiving a report of a domestic disturbance. J.A. 85-87.

The court also held that the admission of the oral statement did not violate the Confrontation Clause. J.A. 87-104. The court held that a statement is "testimonial" for purposes of the Confrontation Clause when it is "given or taken in significant part for purposes of preserving it for potential future use in legal proceedings." J.A. 100. Applying that test, the court concluded that Ms. Hammon's oral statement to Mooney was not testimonial, because Mooney "was principally in the process of accomplishing the preliminary tasks of securing and assessing the scene," and "Ms. Hammon's motivation was to convey basic facts," not to have "her initial re-

sponses preserved or otherwise used against [petitioner] at trial." J.A. 104. The court held that Ms. Hammon's affidavit was testimonial, because "at least one principal reason to preserve Ms. Hammon's story was to provide a basis for its use as evidence or impeachment in [petitioner's] potential criminal prosecution." J.A. 104. The court concluded, however, that the admission of the affidavit was harmless beyond a reasonable doubt. J.A. 106.

## SUMMARY OF ARGUMENT

In *Crawford* v. *Washington*, 541 U.S. 36 (2004), this Court made clear that the Confrontation Clause's core textual and historical concern is eliminating the civil law method of proof, which permitted the use of *ex parte* examinations as evidence against the accused. The Court's approach to determining whether an out-of-court statement infringes that core concern—and thus is "testimonial"—requires assessing whether a modern-day hearsay statement presents the type of acute dangers raised by the historical abuses that the Framers targeted.

As the government's amicus brief in *Davis* v. *Washington*, No. 05-5224, explains in detail, statements made to officials faced with an apparent emergency, and who ask questions reasonably necessary to resolve that emergency, are not "testimonial" statements. Those statements do not share the three central features that characterized the civil law method of *ex parte* examinations: emergency questioning does not clearly convey to the declarant that she is giving statements for use in a legal proceeding; the government is highly unlikely to exploit an emergency to shape statements for use in a future trial; and the statements taken in an emergency

have independent probative force that makes them far more than only a weaker substitute for live testimony.

Because statements given in an emergency have none of the critical features of the classic testimonial statements identified in *Crawford*, and because there is no historical basis for expanding the reach of *Crawford* to encompass such statements, they are not testimonial.

In this case, the oral statements given by Ms. Hammon were made in on-the-scene questioning by officers who were, objectively, faced with a possible emergency and the need to ensure the safety of a possible victim. The statements were the product of an inquiry reasonably necessary to assess the existence of an imminent threat of harm. Accordingly, the statements were not testimonial and their admission did not violate the Confrontation Clause.

## ARGUMENT

### THE VICTIM'S STATEMENT IN THIS CASE WAS NOT TESTIMONIAL BECAUSE IT WAS THE PRODUCT OF EMERGENCY QUESTIONING

The Confrontation Clause guarantees a criminal defendant the right "to be confronted with the witnesses against him." U.S. Const. Amend. VI. *Crawford* v. *Washington*, 541 U.S. 36 (2004), announced the rule under the Confrontation Clause that testimonial statements of an unavailable declarant generally may not be admitted to prove the truth of the matter asserted absent a prior opportunity for cross-examination. Looking to the historical abuses that inspired the Confrontation Clause, the Court identified, as modern–day counterparts, testimony at a preliminary hearing, a grand jury, or a former trial, and the products of police interrogation. The present case involves a class of state-

ments not considered in *Crawford*—statements responding to emergency questioning. Those statements critically differ from the historical abuses at which the Confrontation Clause was centrally aimed, and they are not testimonial.

### A. Statements That Are The Product Of Emergency Questioning Are Not "Testimonial" Under The Confrontation Clause

1. For the reasons set forth in the United States' Brief as Amicus Curiae in *Davis* v. *Washington*, No. 05-5224, out-of-court statements that are the product of emergency questioning are not testimonial within the meaning of this Court's decision in *Crawford*, and their admission therefore does not violate the Confrontation Clause. As explained in that brief, emergency questioning is questioning that is reasonably necessary to determine whether there is a present or imminent risk of harm to an individual or the public, and if so, how to resolve that emergency. *Id.* at 10. Such questioning is not testimonial within the meaning of the Confrontation Clause because it does not have any of the characteristics of the *ex parte* examinations that the Framers sought to abolish as evidence against the accused. In particular, emergency questioning does not communicate to a declarant that his or her statement is being sought for use in a legal proceeding; it does not create a unique danger that the government will shape a statement to support its case; and it often produces statements that have probative force that is independent of a witness's live testimony. *Id.* at 11-19.

Like petitioner in *Davis*, petitioner in this case argues (Br. 13) that any out-of-court statement to a government agent that implicates a person in criminal activ-

ity is testimonial, including statements made in response to emergency questioning. And like petitioner in *Davis*, petitioner alternatively argues (Br. 18), that a statement is testimonial when a reasonable person would anticipate that his statement would be used in investigation or prosecution of crime. For the reasons set forth in the United States' Brief in *Davis* (at 14-16, 19-28), neither approach is consistent with *Crawford*, and neither approach has support in the history of the development of the Confrontation Clause.

2. Petitioner's articulation and defense of his legal standard is particularly flawed for several additional reasons.

First, petitioner relies heavily on a legal test that focuses the "testimonial" determination on "whether the statement fulfills the *function* of testimony." Br. 7. Yet petitioner explicitly declines to make any "detailed or precise exegisis of what that function is." Br. 12. For good reason: the function of testimony is to prove facts that are relevant in the determination of a case. That function extends broadly to *all* hearsay statements, which are, by definition, introduced to prove the truth of the matter asserted. See Fed. R. Evid. 801(c).[1] Petitioner's "functional" test thus logically would encompass the statements of all hearsay declarants, whose words perform the "function" of live, in-court testimony. This

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[1] For that reason, the drafters of the Federal Rules of Evidence took the position that "[i]n a hearsay situation, the declarant is, of course, a witness." Fed. R. Evid. 803 advisory committee's note (1972 proposed rules); see also Fed. R. Evid. 806 advisory committee's note (1972 proposed rules) ("The declarant of a hearsay statement which is admitted in evidence is in effect a witness. His credibility should in fairness be subject to impeachment and support as though he had in fact testified.").

Court in *Crawford*, however, explicitly rejected the idea that all hearsay statements are "testimonial" within the meaning of the Confrontation Clause. See 541 U.S. at 56 (giving examples of non-testimonial hearsay such as business records and statements in furtherance of a conspiracy).

Second, petitioner's further effort to refine (Br. 12-13) his functional test—stating that it includes any statement that "transmits information for use in investigation or prosecution of crime"—also is fatally overbroad. A statement by a co-conspirator to an unknown government agent surely "transmits information for use in investigation or prosecution of crime"; indeed, that is the very purpose for which the undercover informant gathers the information. Yet the Court not only upheld the admission of such statements in *Bourjaily* v. *United States*, 483 U.S. 171 (1987), but reaffirmed that such statements are not "testimonial" in *Crawford*, 541 U.S. at 57-58, and petitioner himself concedes (Br. 14-15) that this rule is correct. The fact that petitioner's functional test captures examples that are universally recognized as *not* testimonial illustrates its flaws. An abstract definition of "testimonial" cannot substitute for *Crawford*'s own approach of examining whether modern practices present closely analogous dangers to the known abuses that prompted the Confrontation Clause.

Third, petitioner asserts (Br. 7) that, "[i]n assessing whether a statement is testimonial, the critical perspective is not that of the questioner, * * * but that of the speaker." Petitioner's exclusive focus (Br. 7) on a declarant's reasonable anticipation that the statement would be used "in investigation or prosecution of crime," however, ignores this Court's emphasis in *Crawford* on a crucial concern underlying the Confrontation Clause:

that "[i]nvolvement of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse—a fact borne out time and again throughout a history with which the Framers were keenly familiar." 541 U.S. at 56 n.7. *Crawford* treated that testimony-generating purpose by government agents as the defining feature of the historical experiences that produced the confrontation right. *Ibid.* Petitioner's attempt to veer away from that focus obscures a central reason why emergency questioning is not testimonial, *i.e.*, that officers facing an apparent emergency do not characteristically act "with an eye toward trial." Rather, reasonable officers perform, first and foremost, a safety and protection function that requires an immediate focus on the danger at hand. That conduct is readily distinguishable from the abuses in *ex parte* generation of evidence in order to prepare a prosecution.[2]

Petitioner incorrectly suggests that the facts in this case prove that emergency questioning is a species of evidence gathering. In his view (Br. 8) , the officer in this case "procured the oral accusation at least in substantial part as a step in the process of gathering proof for prosecution"; the oral statement, he asserts, was not needed "to secure the scene." That analysis displays an

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[2] Petitioner correctly observes (Br. 16) that at the time of the framing, the precise equivalent of modern police forces did not exist. But that observation does not support the conclusion he draws, *i.e.*, that the existence of an evidence-gathering purpose and the risk of governmental shaping of a declarant's words are irrelevant in determining whether a statement is "testimonial." In *Crawford* itself, the Court explained that pre-constitutional magistrates "performed the investigative function now associated primarily with the police," and that police involvement today "in the production of testimonial evidence presents the same risk" as the historic abuses. 541 U.S. at 53.

unrealistic sense of the objective dangers that prompted the officer's actions. An officer who responds to a potential domestic abuse emergency cannot content himself with "securing the scene" while he is there, but must consider the potential for a repeated flare up of violence when he leaves. A reasonable officer would not engage in evidence gathering before ensuring how to protect a potential victim, and if the officer's inquiries did diverge into interrogation, the emergency-questioning rule would be inapplicable to statements so obtained. See U.S. Amicus Br. at 16-17, *Davis* (No. 05-5224). Indeed, courts have recognized that police officers responding to a domestic emergency are primarily involved at first in protecting possible victims from harm, rather than gathering criminal evidence. See, *e.g.*, *United States* v. *Hadley*, 431 F.3d 484, 502 (6th Cir. 2005) (opinion of Rosen, J.) (in responding to a 911 call, officers' dialogue with defendant's wife could "hardly be viewed as * * * 'structured police questioning' directed at the 'production of testimony with an eye toward trial.'" Rather, the officers' concern, at least initially, would have been to ascertain the nature of the assault or domestic disturbance reported by the 911 dispatcher") (quoting *Crawford*, 541 U.S. at 56 n.7).

This recognition appears in other areas of the law as well. The "community caretaking doctrine" under the Fourth Amendment recognizes that "police officers are not invariably engaged in the investigation of criminal activity." *Hadley*, 431 F.3d at 502 (opinion of Rosen, J.). See *United States* v. *Russell*, No. 04-10681, 2006 WL 213853, at *3 (9th Cir. Jan. 30, 2006) (describing Fourth Amendment "emergency doctrine" as permitting warrantless police entries when the police have, *inter alia*, "reasonable grounds to believe that there is an emer-

gency at hand and an immediate need for their assistance for the protection of life or property"); *United States* v. *Brooks*, 367 F.3d 1128, 1135, 1137 (9th Cir. 2004) (entry justified following 911 call reporting possible domestic abuse where officer had "an objectively reasonable belief that a woman might be injured and entry was necessary to prevent physical harm to her"; officer was justified in remaining following her denial of injury to ensure that she was not exposed to "likely future harm at the hands of a hostile aggressor who may remain unrestrained by the law") (internal quotation marks omitted). Cf. *Brigham City* v. *Stuart*, cert. granted, No. 05-502 (Jan. 6, 2006) (presenting questions concerning emergency aid exception to the warrant requirement under *Mincy* v. *Arizona*, 437 U.S. 385 (1978)). A correspondingly practical appraisal of the behavior of a reasonable officer in an emergency should also control here.

**B. The Oral Statements Made By Ms. Hammon Were A Response To Emergency Questioning**

Under the correct legal standard, described above and more fully in the government's brief in *Davis*, Ms. Hammon's oral statement to Officer Mooney that petitioner assaulted her was the product of emergency questioning and therefore was not testimonial. When Officer Mooney first arrived at the home of petitioner and Ms. Hammon in response to a report of a domestic dispute, he asked Ms. Hammon what had happened, and she said that everything was fine. Because Ms. Hammon appeared frightened, however, a reasonable officer would have concluded that there remained a possibility that Ms. Hammon was in immediate danger and that she had

said that everything was fine because she was in fear of petitioner.

The concern of a reasonable officer for Ms. Hammon's safety would have been heightened once the officer entered the house and saw a fire emanating from a gas heater and shattered glass on the floor nearby. That kind of wreckage would have alerted a reasonable officer to the possibility that there might have been a very recent physical altercation between Ms. Hammon and petitioner, that petitioner might be a volatile person who was still simmering under the surface, and that petitioner might immediately attack Ms. Hammon once Officer Mooney left. Petitioner's admission that there had been an argument, but that it had not been physical, would not have dispelled a reasonable officer's concern.

In order to assess that possibility of imminent harm to Ms. Hammon, it was objectively reasonable for Officer Mooney to ask Ms. Hammon what had happened. Only by learning whether there had been a physical altercation, and if so, the nature of that altercation, could a reasonable officer assess whether it would be safe for him to leave or whether he would instead need to take further steps to protect Ms. Hammon from harm. When Ms. Hammon responded that petitioner had thrown her to the ground, pushed her face into the glass, and punched her, she was responding to questioning that was reasonably necessary to determine whether she was in imminent danger. She was not testifying. The Indiana Supreme Court therefore correctly held that the admission of Ms. Hammon's oral statement did not violate the Confrontation Clause.[3]

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[3] The Indiana Supreme Court found that Ms. Hammon told Officer Mooney that petitioner had assaulted her after Mooney asked what

As the Indiana Supreme Court concluded, Ms. Hammon's affidavit, by contrast, was testimonial. A government-solicited affidavit, almost by definition, is "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact." *Crawford*, 541 U.S. at 51 (quoting Noah Webster, *An American Dictionary of the English Language* (1828) (definition of "testimony")). Moreover, unlike emergency questioning, government-solicited affidavits have all the characteristics of *ex parte* examinations. In soliciting an affidavit, the government communicates to a declarant that his or her statement is being sought for use in a legal proceeding; the government's involvement in the production of an affidavit creates a unique danger that the government will shape the statement to support its case;

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happened. J.A. 82. At trial, Officer Mooney did not testify to the specific question he asked; indeed, he did not testify that he asked a question. He did testify, however, that he went into the living room to speak to Ms. Hammon, and that she then told him what had happened. J.A. 17. From that testimony, the Indiana Supreme Court could reasonably infer that Mooney asked Ms. Hammon what had happened. There is no evidence that Mooney engaged in questioning that was objectively structured to produce evidence for a legal proceeding, or that Mooney questioned Ms. Hammon under circumstances that would have imparted to her that her statement was being taken for use in a legal proceeding. See *Crawford*, 541 U.S. at 53 n.4 (finding questioning to be interrogation when knowingly given in response to structured police questioning); See U.S. Amicus Br. at 11, *Davis*, *supra* (No. 05-5224). While petitioner suggests in passing (Br. 34) that Mooney's "what happened" question has the quality of interrogation because he asked the question once before, he does not argue that the case should be decided on that basis. In any event, when officers are faced with circumstances objectively pointing to the existence of an immediate or imminent risk of harm, questioning that is reasonably necessary to determine whether there is an emergency, and if so, how to resolve it, is not interrogation.

and government-solicited affidavits ordinarily produce nothing more than a weak form of live testimony, without any independent probative force. Cf. U.S. Amicus Br. at 11-19, *Davis*, *supra* (No. 05-5224). (discussing the characteristics of *ex parte* examinations and explaining why emergency questioning does not share them).

Although Ms. Hammon's affidavit was testimonial, that does not affect the admissibility of her oral statement that petitioner assaulted her. The oral statement was a response to emergency questioning, and a subsequent affidavit does not retroactively transform the character of an earlier oral statement. Nor is there anything unusual about that sequence of events. Once an officer has obtained the information necessary to determine whether there is an emergency, and if so, how to resolve it, he may naturally and reasonably turn to other matters, including the collection of evidence for use at trial. That phenomenon does not cast doubt on the emergency nature of the original questioning.

No matter how close in time two statements are, each must be evaluated individually to determine whether it was taken by a procedure that resembles the *ex parte* examinations that the Framers sought to abolish as evidence against the accused. Because Ms. Hammon's oral statement that petitioner had assaulted her was the product of emergency questioning, it was not taken through a procedure that resembles *ex parte* examinations. The subsequent use of a procedure that *does* resemble *ex parte* examinations does not alter that conclusion.

## CONCLUSION

The judgment of the Indiana Supreme Court should be affirmed.

Respectfully submitted.

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IN THE

# Supreme Court of the United States

ADRIAN MARTELL DAVIS,

*Petitioner,*

—v.—

WASHINGTON,

*Respondent.*

HERSHEL HAMMON,

*Petitioner,*

—v.—

INDIANA,

*Respondent.*

ON WRITS OF CERTIORARI TO THE SUPREME COURTS OF WASHINGTON AND INDIANA

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## TABLE OF CONTENTS


Page

INTEREST OF AMICI ..... 1

STATEMENT OF THE CASE ..... 2

SUMMARY OF ARGUMENT ..... 4

ARGUMENT ..... 6

I. Out-Of-Court Statements Are "Testimonial" Under The Confrontation Clause, And Thus Inadmissible, If a Reasonable Person Under The Circumstances Would Understand That The Statements Could Be Used For Criminal Investigation Or Prosecution ..... 6

II. *Hammon*: The Significance Of Interrrogation ..... 10

III. *Davis*: The Speaker's Motivation And Demeanor ..... 15

IV. The Confrontation Clause Is Not Incompatible With Effective Domestic Violence Prosecutions ..... 18

A. The Problem Of Reluctant Witnesses ..... 19

B. Sates Have A Variety Of Available Tools To Facilitate Domestic Violence Prosecutions Without Sacrificing Confrontation Clause Values ..... 22

C. The Fight Against Domestic Violence Should Not Be Measured Solely In Terms of Convictions.....24

CONCLUSION .....26

## TABLE OF AUTHORITIES

**Cases**

*Bourjaily v. United States*,
483 U.S. 171(1989) ..... 8

*Crawford v. Washington*,
541 U.S. 36 (2004) ..... *passim*

*Hammon v. State*, 829 N.E.2d 444
(Ind. Sup.Ct. 2005) ..... 3, 11, 13, 17

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156 U.S. 237 (1895) ..... 18

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(Cal. Ct. App. 2004) ..... 16

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(N.Y. Sup. Ct. 2004) ..... 16

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(Ill. App. Ct. 2005) ..... 17

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11 Colum. J. Gender & L. 1 (2002) ..... 19

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86 Geo. L.J. 1011 (1998) ..... 8

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## INTEREST OF *AMICI*[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with more than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution. The ACLU Women's Rights Project, founded in 1972, seeks to advance equality and justice for women and girls, including vigorous protection for women facing domestic abuse. The ACLU of Washington and the ACLU of Indiana are statewide affiliates of the ACLU.

The ACLU has a long-standing commitment to the fairness of criminal trials, including the right of the criminally accused to confront the witnesses against them. The ACLU accordingly appeared as *amicus curiae* in *Crawford v. Washington*, 541 U.S. 36 (2004), urging the reinvigoration of the Confrontation Clause that *Crawford* embraced. The ACLU also has a long-standing commitment to equal rights for women, which are endangered when the state fails to take appropriate action to punish and deter violence against women. In furtherance of that commitment, the ACLU recently appeared as *amicus curiae* in *Town of Castle Rock v. Gonzales*, ___ U.S. ___, 125 S.Ct. 2796 (2005), in support of a constitutional claim for damages filed by a woman whose three children were killed by her estranged husband after the police failed to enforce a protective order.

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[1] Pursuant to Rule 37.3, letters of consent to the filing of this brief have been lodged with the Clerk of the Court. Pursuant to Rule 37.6, counsel for *amici* curiae states that no counsel for a party authored this brief in whole or in part and no person other than *amici* curiae, its members or its counsel made a monetary contribution to the preparation of this brief.

Lower courts have struggled in defining and applying the principles of *Crawford*, especially in domestic violence prosecutions, where pressure to rely on a victim's out-of-court statement is frequently enhanced by the fact that many victims of domestic violence are unable or unwilling to testify at trial. For reasons set forth below, we believe that a proper understanding of the Confrontation Clause requires reversal of the judgments in both *Hammon* and *Davis*. Respect for the Confrontation Clause, however, must not become an excuse for non-enforcement of domestic violence laws. Domestic violence remains a serious social problem that the state has a duty to address through constitutionally appropriate means, some of which are also discussed below.

The proper resolution of these cases is therefore a matter of significant interest to the ACLU and its members.

## STATEMENT OF THE CASE

The cases before the Court involve two types of out-of-court statements routinely admitted in evidence-based domestic violence prosecutions – statements by victims to police officers responding to the scene of a domestic disturbance and statements to 911 operators describing a recent or contemporaneous act of violence.

In *Hammon*, police responded to a report of a domestic disturbance. On the scene, they interviewed Amy Hammon, who stated in response to police questioning that she had been assaulted by her husband Herschel. Officers gave her an affidavit to fill out and sign reciting her allegations. The state then charged Herschel Hammon with domestic battery. Amy Hammon did not appear as a witness at his bench trial, although she had been subpoenaed by the prosecution. In her absence, and over defendant's objection, one of the responding officers testified to Amy Hammon's

oral statements and her affidavit was admitted into evidence. This was the only evidence offered to prove the crime of domestic battery.

Herschel Hammon was tried before this Court decided *Crawford* and the trial court admitted the statements at issue under two hearsay exceptions. Following *Crawford*, the Supreme Court of Indiana ruled that Amy's oral statement was not testimonial within the meaning of *Crawford* and was thus properly admitted. It reached the opposite conclusion with regard to the written statement, but nevertheless concluded that its admission was harmless error because the case was tried before a judge rather than a jury. *Hammon v. State*, 829 N.E.2d 444, 457-59 (Ind. Sup.Ct. 2005). The court construed *Crawford* as requiring a subjective inquiry into whether either the questioner or the declarant was "principally motivated by a desire to preserve the statement" for potential use in future legal proceedings. *Id.* at 456.

In *Davis*, a caller dialed a 911 operator and hung up. The operator called back and spoke to Michelle McCottry, who stated in response to the operator's questions that she had been assaulted by her former boyfriend, Adrian Davis. McCottry did not testify at the subsequent trial for felony violation of a domestic no-contact order. Instead, the prosecution used portions of the recording of her conversation with the 911 operator as the only evidence identifying Davis as the assailant.

The Supreme Court of Washington first observed that *Crawford* requires an examination of "the circumstances of the 911 call in each case to determine whether the declarant knowingly provided the functional equivalent of testimony to a government agent." *State v. Davis*, 111 P.3d 844, 850 (Wash.Sup.Ct. 2005). It then held that "the portion of McCottry's 911 call that identified Davis as her assailant was

non-testimonial and properly admitted" because they were made as part of an ongoing emergency situation and there was no evidence that she intended her statements to be used for prosecution purposes. *Id.* at 851.

## SUMMARY OF ARGUMENT

The present cases involve the relationship between two vital concerns. First, criminal trials must be conducted fairly and in accordance with the Sixth Amendment's Confrontation Clause. Second, violence against women, and domestic violence in particular, is a significant social problem that has too often failed to receive the attention it deserves from the criminal justice system. These concerns cannot and should not be treated as mutually incompatible. Victims of domestic violence have a right to expect that laws designed for their protection will be enforced against their abusers, and those accused of domestic violence have a right to cross-examine the witnesses against them in any criminal proceeding.

If the victim is willing to testify, the solution is simple. In many cases, however, domestic violence victims are unwilling to testify for various reasons, including the fear of further victimization. Many prosecutors in the past used that reluctance as an excuse to abandon prosecutions they were not enthusiastic about in the first instance. That, in turn, produced a public backlash that forced the law enforcement community to treat domestic violence more seriously. In response, prosecutors have increasingly sought to overcome the problem of reluctant domestic violence witnesses by employing what is sometimes called an "evidence-based prosecution" or "victimless prosecution," where the victim's out-of-court description of the crime is entered into evidence in lieu of live testimony from the

witness. Unfortunately, that has merely replaced one problem with another.

As this Court explained in *Crawford*, the Confrontation Clause prohibits the use of testimonial evidence that has not been subject to cross-examination even if there are indicia of reliability that would otherwise satisfy the rules of evidence governing hearsay. 541 U.S. at 62. That is because the Confrontation Clause serves a broader purpose than the hearsay rules. Among other things, the framers of the Constitution were well aware that the reliance on *ex parte* evidence undermines the credibility of the judicial process regardless of how reliable the evidence might be in particular cases. *See, e.g., Pointer v. Texas*, 380 U.S. 400, 404 (1965). By its very nature, such *ex parte* evidence is also more susceptible to manipulation. *See, e.g., Crawford*, 541 U.S. at 56 n.7.

In *Crawford* itself, there was little dispute that the challenged statement was in fact testimonial and thus no need for the Court to define the limits of that term with any precision. These cases arise in a context that has proven more vexing for the lower courts. In our view, the purposes of the Confrontation Clause are best served by an objective test that does not turn on the speaker's motivation but, rather, asks whether a reasonable person under the circumstances would have understood that any accusatory statements could be used for criminal investigation or prosecution. That is the test we proposed in *Crawford*, and we continue to believe it is correct. *See* 541 U.S. at 52.

Because neither court below applied this standard, neither judgment can be sustained. A strategy to address domestic violence cannot be premised on an end run around the Constitution. At the same time, compliance with the Constitution does not and cannot relieve government officials of their obligation to develop an effective response to

domestic violence. For example, experience has shown that domestic violence victims are more likely to testify if they have access to advocates who explain the process, help victims ensure their safety, and work with victims to deal with the legal, economic, and medical issues stemming from the violence. This is not surprising, but it is often overlooked.

## ARGUMENT

### I. OUT-OF-COURT STATEMENTS ARE "TESTIMONIAL" UNDER THE CONFRONTATION CLAUSE, AND THUS INADMISSIBLE, IF A REASONABLE PERSON UNDER THE CIRCUMSTANCES WOULD UNDERSTAND THAT THE STATEMENTS COULD BE USED FOR CRIMINAL INVESTIGATION OR PROSECUTION

The compact language of the Confrontation Clause -- "In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him" -- serves many purposes. *See* Akhil Reed Amar, *Twenty-Fifth Annual Review of Criminal Procedure – Preface: Sixth Amendment First Principles*, 84 Geo. L.J. 641, 643, 689 (1996). A primary goal is to ensure that evidence against the accused is reliable. But an exclusive focus on confrontation as a mere proxy for quality of evidence led to the unpredictable and ultimately unworkable framework of *Ohio v. Roberts*, 448 U.S. 56 (1980), which linked Confrontation Clause analysis with hearsay rules of evidence in a manner that *Crawford* ultimately rejected. As confrontation law develops under *Crawford*, courts should not ignore these other values.

- The requirement of confrontation at trial affects law enforcement before trial, by removing an incentive for police to fabricate inculpatory out-of-court statements or to procure them through coercion or duress. The declarant's appearance for cross-examination "permits the uncovering and revealing of intentional or negligent governmental abuses in the creation of testimony, abuse that leaves the individual at the mercy of a vastly more powerful state and that may expose the innocent to conviction at the hands of vindictive or incompetent police or prosecutors." Andrew E. Taslitz, *What Remains of Reliability: Hearsay and Freestanding Due Process After Crawford v. Washington*, 20-Sum. Crim. Just. 39, 41 (2005).

- At trial, confrontation is also a matter of simple fairness for the accused, giving defendants the best opportunity to mount their challenge to the state's best evidence. It has also been recognized since Biblical times that some form of structured face-to-face meeting between the accuser and the accused is at the core of justice. Confrontation thus has a moral component above and beyond its utility as a truth-finding mechanism. This is why the Sixth Amendment makes confrontation a "right" of the accused, and not merely a direction to the courts.

- Confrontation also has benefits after trial. By ensuring that the state brings its best evidence to trial, and by giving the defendant a fighting chance to contest it, public confidence in the trial's result is enhanced, no matter what the outcome. As with the right to trial by jury, "there are good political and symbolic reasons" to insist on confrontation during criminal trials; it too "promotes the perceived fairness

and legitimacy of the justice system." Taslitz, *What Remains of Reliability*, 20-Sum. Crim. Just.at 42,

Taking these and other values together, confrontation becomes more than just an evidentiary tool – it is a fundamental characteristic of the "way we do judicial business." Richard D. Friedman, *Confrontation: The Search for Basic Principles*, 86 Geo. L.J. 1011, 1028-29 (1998). The ACLU submits here, as it did in *Crawford*, that statements are testimonial -- and hence not admissible for the truth of the matter asserted in the absence of confrontation -- when they are made under circumstances in which a reasonable person would understand that the statements could be used for criminal investigation or prosecution.

The standard proposed by the ACLU is consistent with the text of the Confrontation Clause, which requires the production at trial of a "witness against" the accused. Whatever else might be encompassed in the term, it is certainly reasonable to conclude that one is acting as a "witness against" a person when one knowingly tells the police that the person has engaged in criminal activity, both because of the accusatory nature of the statement and because of the foreseeable likelihood that the statement will be used as the basis for further law enforcement activity. To be sure, many statements are made to police by persons who are not knowingly acting as witnesses against another, as when a conspirator makes a statement to an undercover officer in the conspiracy. *See Bourjaily v. United States*, 483 U.S. 171, 183-84 (1989). But the words "witness against" cannot be satisfactorily defined in any way that would exclude situations where a person knowingly delivers to the police an accusation that another person has committed a crime.

Focusing on a statement's content, rather than its form, is entirely consistent with *Crawford*. There, the Court

categorically rejected the notion that the Confrontation Clause only applies to in-court testimony. 541 U.S. at 50-51. It rejected the notion that a person is only acting as a "witness against" the accused when he gives a statement under oath. *Id.* at 52. It rejected the notion that a testimonial statement must be in writing. (Indeed, the excluded statements by Sylvia Crawford at the police station were oral.) And finally, *Crawford* was carefully written to allow for a more expansive definition of testimonial statements to develop in later cases. *Id.* at 68 (the Confrontation Clause "applies at a minimum to prior testimony [in a courtroom] and to police interrogations," but other statements may be testimonial as well).

The proposed test also furthers the interest in predictability articulated in *Crawford* because it is an objective inquiry. As such, it avoids the dangers inherent in allowing courts to resolve admissibility questions based on the type of subjective inquiries often permitted or required under hearsay law that the Court rejected as constitutionally infirm in *Crawford*. Under an objective inquiry, courts should not rely on a particular declarant's subjective reason for making a statement in determining whether it is testimonial. Thus, an objective inquiry will avoid the phenomenon, on full display in the present cases, of judges speculating about the state of mind of an absent person to determine his or her unspoken motivation for making an accusatory statement to the police. Such determinations, naturally, are unassailable precisely because the defendant cannot question the witness about the circumstances surrounding the statement. A test that requires a judge to divine an absent witness' subjective motivations will necessarily generate inconsistent results, as it did under the *Roberts* framework.

These and similar reasons have convinced many federal courts of appeals that the best measure of a testimonial statement under *Crawford* is whether a reasonable person in the declarant's circumstances would expect the statement to be the basis for further investigation or prosecution by law enforcement. *E.g., U.S. v. Hinton*, 423 F.3d 355, 359 (3rd Cir. 2005) (confrontation right applies to "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial."); *U.S. v. Cromer*, 389 F.3d 662, 674 (6th Cir. 2004) ("Statements 'made to the authorities who will use them in investigating and prosecuting a crime, ... made with the full understanding that they will be so used,' are precisely the sort of accusatory statements the Confrontation Clause was designed to address") (citation omitted); *U.S. v. Saget*, 377 F.3d 223, 229 (2nd Cir.2004) ("the [Crawford] Court would use the reasonable expectation of the declarant as the anchor of a more concrete definition of testimony.").

## II. *HAMMON*: THE SIGNIFICANCE OF INTERROGATION

The fundamental mistake of the Indiana Supreme Court in *Hammon* was to assume that the examples of testimonial statements provided by *Crawford* (in-court testimony and police interrogations) constituted an exhaustive list that relieved it of any further obligation to assess whether the admission of Amy Hammon's statement was consistent with the underlying purposes of the Confrontation Clause. Based on that misunderstanding, the Indiana Supreme Court then focused its attention on whether the oral conversation between Amy Hammon and the police was an interrogation. The court concluded that it was not an interrogation because the officers' questions were not

"attempts by police to pin down and preserve statements" but instead were "efforts directed to determining whether an offense has occurred, protection of victims or others, or apprehension of a suspect." 829 N.E. 2d at 457. The court also considered it significant that Amy Hammon's "motivation was to convey basic facts," and that there was no "suggestion" that Amy intended her oral statements to be preserved or otherwise used against her husband. *Id.* at 458.

As an initial matter, the Indiana court relied on an inappropriately cramped notion of what constitutes an interrogation. *Crawford* made clear that its use of the term interrogation was not limited to the facts of that case (extended in-custody questioning of a potential suspect). Instead, the term is to be used in its "colloquial, rather than any technical legal, sense" for Confrontation Clause purposes. 541 U.S. at 53 n. 4. . *See also U.S. v. Baker*, 2005 WL 3369204 at *3 (11th Cir. 2005) (citations omitted) ("As the *Crawford* Court used the term 'interrogation' in the 'colloquial' and not 'technical legal' sense, statements given in a formal interrogation setting at a police station and witness statements given to an investigating police officer are both considered "testimonial'.").

The facts of *Hammon* clearly fit within the colloquial understanding of an interrogation. Upon arriving at her home, the police questioned Ms. Hammon about suspected criminal activity. 829 N.E.2d at 446-47. When she initially responded that nothing was the matter, the police investigated the scene and then returned and renewed their questioning as to what had occurred. *Id.* Upon this renewed questioning, she stated that her husband had assaulted her. At a minimum, repeated police questioning of a witness about a suspected crime constitutes interrogation under any reasonable definition of that term.

Moreover, if the difference between interrogation and other types of questioning hinges on particular indicia of formality, the Confrontation Clause inquiry can be easily manipulated by police, prosecutors, and the courts:

> If certain characteristics are deemed crucial for treating a statement as testimonial, then repeat players involved in the creation or receipt of prosecution evidence will have a strong incentive, and often ready means, to escape that treatment, simply by avoiding those characteristics. We have seen this already. Some courts have indicated that even if a statement made knowingly to the police accuses a person of a crime, it is not testimonial unless it is the product of a formal interrogation conducted after the police have determined that a crime has been committed. Some courts have held that, so long as the police can be deemed to have been assessing and securing the scene, even a statement making an express criminal accusation is not testimonial. As a result, we have seen police advised to try to secure accusatory statements before beginning what would necessarily be deemed a formal interrogation.

Richard D. Friedman, *Grappling with the Meaning of "Testimonial,"* 71 Brooklyn L.Rev. 241, 248-49 (2005); *see also* Robert P. Mosteller, *"Testimonial" and the Formalistic Definition – The Case for an "Accusatorial" Fix*, 20-Sum. Crim. Just. 14, 20 (2005) ("If the form of the statement is important to its testimonial nature ... then governmental officials who receive the statement can consciously manipulate those circumstances to exclude the statement from coverage."). As the Sixth Circuit recently observed: "If the judicial system only requires cross-examination when someone has formally served as a witness against a

defendant, then witnesses and those who deal with them will have every incentive to ensure that testimony is given informally." *U.S. v. Cromer*, 389 F.3d at 675.

More fundamentally, however, the Indiana court's focus on the term "interrogation" itself is misplaced. The better approach is not to debate the definition of "interrogation" (a word not found in the Confrontation Clause), but to focus on whether Amy Hammon was a "witness against" Herschel Hammon when she told police he had assaulted her. She plainly was, because a reasonable person in her situation would know that telling the police that Herschel assaulted her would almost certainly lead to further investigation and might well result in Herschel's arrest. Introduction of the statement at trial carries the same potential for law enforcement manipulation and untested accusation as the ex parte affidavits used against Sir Walter Raleigh. From the defendant's point of view, Amy Hammon's oral statement as recounted by the police is equally damning as the affidavit recounting the same facts that the Indiana court found itself bound to exclude. 829 N.E.2d at 458. Both are equally impossible to test before thefinder of fact.

By resolving *Hammon* with reference to the broader question, the Court can avoid the exercise of choosing among competing definitions of "interrogation." It would also avoid limiting the analysis to cases in which the statements to the police are in response to questioning. It is inevitable that there will be statements made to police officers at a crime scene that are volunteered or unsolicited. Answering only the narrow question of whether statements in response to police questioning constitute an "interrogation" will leave courts and litigants with no guidance as to other types of statements made to police investigating a crime, even where those statements are clearly accusatory. And, undoubtedly, it

will spawn a whole new round of litigation around the issue of when a particular statement is truly "in response" to an interrogation, as opposed to volunteered or unsolicited.

The role of the police in procuring the challenged statement is often relevant, but not dispositive to the Confrontation Clause analysis. For example, if Amy Hammon had written her statement on her own and delivered it to the police, the Confrontation Clause would still have barred its admission in court. On the other hand, *Crawford* understandably expressed a particular concern with government involvement in producing or eliciting an out-of-court statement, a concern the ACLU shares. *Id.* at 52 ("Police interrogations bear a striking resemblance to examinations by justices of the peace in England."); *Id.* at 53 ("The involvement of government officers in the production of testimonial evidence presents the same risk [as justices of the peace conducting examinations under the Marian statutes.") Police questioning is highly relevant to whether a declarant would reasonably understand that his or her statements would be available for later use in a criminal prosecution or investigation. Speakers reasonably understand that police are gathering evidence for prosecution when they question a person about a crime. Properly understood, therefore, the existence of police questioning is usually sufficient to establish that a statement is testimonial, but it is not necessary.

The objective standard focusing on a reasonable person's understanding offers multiple advantages over the test relied on by the *Hammon* court: it is simple, consistent with the constitutional language, resistant to word games, and does not hinge on speculative assumptions about subjective motivations of witnesses (the most important of whom was absent).

## III. *DAVIS:* THE SPEAKER'S MOTIVATION AND DEMEANOR

Where the primary error in *Hammon* was its misplaced focus on whether the police questioning of Amy Hammon constituted "interrogation," the primary error in *Davis* was its misplaced focus on the subjective motivation and demeanor of the witness, Michelle McCottry. The Washington Supreme Court reasoned that statements within a 911 call should be classified according to whether they are a "cry for help to be rescued from peril" (nontestimonial) or whether they are "generated by a desire to bear witness" (testimonial), irrespective of whether the content of the cry for help also implicates the defendant in a crime. *See, e.g. State v. Davis*, 111 P.3d at 849. The court then characterized Ms. McCottry's statement as the former rather than the latter, in part because of "her crying and hysterical" demeanor. *Id.* at 850.

This approach undermines the purposes of the Confrontation Clause. From the perspective of the defendant whose confrontation right is at stake, it does not matter whether the witness against him is motivated by the specific subjective desire to have the statement be used in a later trial. *White v. Illinois*, 502 U.S. 346 (1992), properly rejected the suggestion that the Confrontation Clause would hinge on whether "the statement has been made for the *principal purpose* of accusing or incriminating the defendant." *Id.* at 352 (emphasis added).[2] So long as the declarant is narrating a description of the defendant's allegedly criminal behavior to the police or other law enforcement personnel (including 911 operators), the declarant is a "witness against" the

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[2] This aspect of *White's* holding was not called into question by *Crawford*.

accused. The testimonial nature of the statement should be tested by reference to how a reasonable person would expect the statement to be used.[3]

Of course, 911 service plays a dual role in our society – it can be both a mechanism to summon help in an emergency and a mechanism for reporting criminal activity. Furthermore, a single 911 call often invokes both roles. Under the objective standard proposed, however, statements made by during a 911 call describing criminal activity should be treated as "testimonial" for Confrontation Clause purposes in light of the common knowledge that 911 operators are affiliated with law enforcement, and that their job is to transmit information about criminal activity from the caller to the police.[4]

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[3] Other courts have gone farther than Washington to say that any statement that is an excited utterance is per se nontestimonial. *See, e.g., U.S. v. Brun*, 416 F.3d 703, 707-08 (8th Cir. 2005) (indicating that statement to 911 operator is nontestimonial when it is "emotional and spontaneous" and holding that statements to responding police officer were "excited utterances and thus nontestimonial statements"); *People v. Moscat*, 3 Misc. 3d 739, 746 (N.Y. Sup. Ct. 2004) (adopting a rule that 911 calls are not testimonial for the same reason that they are excited utterances—"because there has been no opportunity for the caller to reflect and falsify her (or his) account of events"); *People v. Corella*, 18 Cal. Rptr.3d 770, 776 (Cal. Ct. App. 2004) (stating that it is difficult to perceive any circumstances under which an excited utterance would be testimonial); *State v. Banks*, No. 03AP-1286, 2004 WL 2809070, at *3 (Ohio Ct. App. Dec. 7, 2004) (stating that *Crawford* does not apply to statement subject to common-law exceptions to the hearsay rule, such as excited utterance)

[4] In *Davis*, the state court brushed aside the argument that Ms. McCottry reasonably knew that her statements could be used to prosecute Mr. Davis because it is common knowledge that statements made in the course of a 911 call can be used prosecutorially with the observation that there was "no evidence that McCottry had such knowledge or that it influenced her decision to call 911." *Davis*, 111 P.3d at 850. It confidently concluded that, under the facts of the case, McCottry called 911 "because of an

In a given case, there may be some portions of 911 calls (or indeed portions of any out-of-court statement) that are not testimonial and can be introduced into evidence. This would include the portion of the call that is strictly a "cry for help" and does not describe another person's criminal activity. *See People v. West*, 823 N.E.2d 82, 91 (Ill. App. Ct. 2005) (finding statements to 911 operator describing nature of alleged attack, victim's medical needs, and victim's location to be nontestimonial, while statements describing assailants' vehicle and the direction in which they fled to be testimonial). Although this part of a call may be a small portion of the entire conversation, the fact that a person sought aid from 911 at a particular time will often be an important and relevant item of evidence for the prosecution.

The state court decisions in both *Davis* and *Hammon* illustrate the same tendency seen in many *Roberts*-era cases. When *Roberts* said out-of-court statements could be admitted into evidence without confrontation if they fell within a "firmly rooted" hearsay exception, courts were pressured to steadily expand these exceptions. *Davis* and *Hammon* illustrate the similar pressure on courts to expand the definition of "nontestimonial." To avoid this risk, courts should not pretend that a person is not a "witness against" another when making statements in circumstances where a

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immediate danger" and that there was "no evidence [she] sought to 'bear witness' in contemplation of legal proceedings." *Id.* at 851. The court did not explain how the defendant could have produced this evidence so long as Ms. McCottry was unavailable and could not be questioned regarding her motives and her understanding of how her statement might be used. This is similar to the *Hammon* court's finding with respect to Amy Hammon's oral statement that her "motivation was to convey basic facts and [there] was no suggestion that [she] wanted her initial response to be preserved or otherwise used against her husband at trial," even though she was unavailable and could not be questioned as to her motives. 829 N.E.2d at 458.

reasonable person would expect those statements to be used for criminal investigation or prosecution.

There may be room in Confrontation Clause jurisprudence for genuine exceptions to the confrontation rule. *See generally Mattox v. United States*, 156 U.S. 237, 243 (1895) (noting that in some instances exceptions to the Confrontation Clause may be appropriate when such exceptions were recognized at the time of its adoption). Indeed, *Crawford* notes that there may be an exception to the confrontation requirement for dying declarations. 541 U.S. at 56 n.6. It also reaffirms that the Confrontation Clause does not bar admission of statements made by witnesses whose unavailability arises from the defendant's own wrongdoing. *Id.* at 62. If this Court chooses to make an exception for accusatory statements made during exigent circumstance or as part of a cry for help, rather than asserting that such statements are nontestimonial, the more analytically justified approach would be to recognize such an exception explicitly and justify it in terms of the history and purposes of the Confrontation Clause. *See id.* at 58 n.8.

Absent such an exception, the reasoning and results in *Davis*, like those in *Hammon*, cannot be sustained.

## IV. THE CONFRONTATION CLAUSE IS NOT INCOMPATIBLE WITH EFFECTIVE DOMESTIC VIOLENCE PROSECUTIONS

Just as the difficulties of prosecuting domestic violence cannot be an excuse for abandoning the Confrontation Clause, the requirements of the Confrontation Clause cannot and should not be seen as an insurmountable barrier to domestic violence prosecutions.

### A. The Problem of Reluctant Witnesses

Prosecutors committed to trying domestic violence cases have tended to rely so heavily on victims' out-of-court statements because many forces discourage victims from testifying. According to some recent estimates, 80 to 90 percent of domestic violence victims whose abusers become involved with the criminal justice system recant or otherwise fail to assist the prosecution at some point in the proceedings. *See* Tom Lininger, *Prosecuting Batterers After Crawford*, 91 Va. L. Rev. 747, 768 n.103 (2005), Douglas E. Beloof & Joel Shapiro, *Let the Truth Be Told: Proposed Hearsay Exceptions to Admit Domestic Violence Victims' Out of Court Statements as Substantive Evidence*, 11 Colum. J. Gender & L. 1, 3 (2002).

Some victims do not cooperate with prosecutors because they fear retaliation by the defendant. That fear may be a reasonable projection from past conduct. In other instances there may be express threats of retaliation or actual retaliatory violence by the batterer. Indeed, data indicate that such threats and retaliation may occur in the majority of domestic violence prosecutions. *E.g.*, Lininger, *supra*, at 769; Laura Dugan *et al.*, *Exposure Reduction or Retaliation? The Effects of Domestic Violence Resources on Intimate Partner Homicide*, 37 Law & Soc'y Rev. 169, 179 (2003); Barbara Hart, *Battered Women and the Criminal Justice System*, 36 Am. Behavioral Scientist 624, 626 (1993); *see also* Deborah Epstein *et al.*, *Transforming Aggressive Prosecution Policies: Prioritizing Victims' Long-Term Safety in the Prosecution of Domestic Violence Cases*, 11 Am. U.J. Gender Soc. Pol'y & L. 465, 476 & n.38 (2003) (describing study in which women identified fear of batterer as the number one reason why they were unwilling to cooperate with government). Battered women are at a heightened risk of violence at the moment they seek to separate from their

abusers; cooperation in criminal prosecution is often meant and understood as a means of formally separating from an abuser and thus presents increased danger to victims. *E.g.*, Dugan *et al.*, *supra*, at 174; Ronet Bachman & Linda E. Saltzman, U.S. Department of Justice, *Violence Against Women: Estimates from the Redesigned National Crime Victimization Survey* (1995); *see generally* Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 Mich. L. Rev. 1 (1991) (explaining dynamics and prevalence of separation assault). As a result, many individuals who have experienced domestic violence quite reasonably conclude that criminal prosecution of their batterers will leave them less safe.

Others victims of domestic violence do not testify for other reasons, including: economic dependence on their batterer; concern that an immigrant batterer will be deported upon conviction; fear of an adverse reaction from family or community, who might regard a victim's participation in the prosecution as a betrayal; apprehension that involvement in the criminal justice system will lead to the loss of child custody to child protective services; or continuing emotional connections to their batterer. Epstein *et al.*, *supra*, at 477-82; Hart, *supra*, at 627-28. Victims of domestic violence, like other victims of crime, sometimes cease to cooperate in prosecution because of the time and effort that such cooperation entails. The difficulties presented by taking repeated time off work or repeatedly finding child care in order to participate in court proceedings, for instance, can impose significant barriers to participation, particularly to individuals who may be facing other crises in their lives as a result of the violence they have experienced. Deborah Epstein, *Effective Intervention in Domestic Violence Cases: Rethinking the Roles of Prosecutors, Judges, and the Court System*, 11 Yale J. L. & Feminism 3, 25 (1999); Hart, *supra*, at 628. Moreover, while attitudes are changing, battered

women too often are viewed by the criminal justice system as somehow responsible for the crimes against them, leading domestic violence victims to reject participation in criminal trials. *E.g.*, Hart, *supra*, at 626-27.

It is also important to recognize, however, that as with all crimes, some alleged victims refuse to testify because their initial accusations were untrue or exaggerated. For instance, batterers may falsely accuse their partners of abuse in an attempt to gain an upper hand in the relationship. *E.g.*, Emily J. Sack, *Battered Women and the State: The Struggle for the Future of Domestic Violence Policy*, 2004 Wis. L. Rev. 1657, 1692-93 (2004). Thus, the function of confrontation as a tool to vindicate the innocent has as much of a role in domestic violence prosecutions as in other criminal prosecutions.[5] Additionally, a fair trial with confrontation rights may itself heighten the deterrent effect of the criminal conviction by demonstrating the system's fairness to the accused. Individuals arrested for domestic violence may be less likely to engage in violence in the future when they believe that they were treated in a procedurally fair manner upon their arrest. See Raymond Paternoster et al., *Do Fair Procedures Matter? The Effect of Procedural Justice on Spouse Assault*, 31 Law and Soc'y Rev. 163, 165 (1997).

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[5] While a substantial majority of domestic violence prosecutions involve a man accused of harming a woman, it would be a mistake to think that only male defendants benefit from the right to confrontation. There are increasing numbers of prosecutions of women for domestic assaults on men, and jurisdictions with large gay populations have begun to bring domestic violence charges against men and women in same-sex relationships.

### B. States Have A Variety of Available Tools To Facilitate Domestic Violence Prosecutions Without Sacrificing Confrontation Clause Values.

States have many tools available to address the reasons that domestic violence victims fail to testify and thus pursue domestic violence prosecutions consistent with the Confrontation Clause. Some data suggest that by using combinations of these techniques, victims will cooperate fully in a prosecution in sixty-five to ninety-five percent of cases. Angela Corsilles, Note, *No-Drop Policies in the Prosecution of Domestic Violence Cases: Guarantee to Action or Dangerous Solution?*, 63 Fordham L. Rev. 853, 873 (1994).

First, victims who receive the services of a victim advocate are far more likely to assist with the prosecution of their abuser. Melanie Randall, *Domestic Violence and the Construction of 'Ideal Victims': Assaulted Women's "Image Problems" in Law*, St. Louis Univ. Pub. L. Rev. 107, 143 (2004) (battered women three times more likely to be willing to testify when they met with an advocate); *see also* Epstein, *supra*, at 20 (1999) (survivors able to access interpersonal support twice as likely to cooperate with prosecution). Advocates can work with victims to demystify the criminal process, address the range of needs created by the violence, help link victims to services, assist them with civil legal needs, and provide encouragement and support. *See, e.g.*, Sack, *supra*, at 1728-29 (2004). For instance, advocates canhelp address a victim's concerns that cooperation will endanger her by offering safety planning or assistance in obtaining a protective order. They might also assist a victim who is concerned about loss of a batterer's income by directing her to available benefits and explaining the application procedures for these benefits. Jurisdictions can

enhance domestic violence prosecution by providing these domestic violence advocacy services.

Second, jurisdictions can do more to make safety a reality for domestic violence victims. Increased resources to services for individuals seeking to escape domestic violence, including housing, job training, and the like, may also indirectly lead to greater victim cooperation in criminal prosecution by reducing the danger and cost of ending a violent relationship. *See generally supra* at 1735 (2004).

Third, some of the obstacles to testifying are the result of inefficiency within the criminal justice system. By coordinating the often separate fields of criminal prosecution and civil no-contact orders, prosecutors or criminal court judges can help victims maneuver within the legal system and reduce the frustration that leads to noncooperation. Epstein, *supra*, at 21-34; Sack, *supra*, at 1731-32. Women who have experienced domestic violence are also more likely to cooperate with prosecution when they are not implicitly or explicitly blamed for the violence against them by police, prosecutors, or judges. *See* Hart, *supra*, at 626.

Fourth, because victims' willingness to participate in criminal proceedings often diminishes over time, preserving testimony at an earlier stage may permit prosecutions to go forward that otherwise would have floundered on the lack of victim testimony. Lininger, *supra*, at 784-97.

Fifth, thorough police work may help ensure a successful prosecution even if the complaining witness does not testify. Under the *Roberts* rule, police had confidence that they could obtain a conviction with little more than a 911 tape, thus eliminating an incentive to pursue other leads that could help seal the case. To be sure, a large number of domestic assaults are witnessed only by the assailant and the victim. But in other cases there may often be other

witnesses, such the person(s)who first called the police in *Hammon*, or the other persons on the scene (children and the man named Mike) when the 911 call was made in *Davis*. It would be a mistake for the Court to believe that domestic violence can be prosecuted only through a relaxed approach to the Confrontation Clause.

### C. The Fight Against Domestic Violence Should Not Be Measured Solely In Terms of Convictions

Some advocates have expressed concerns that application of *Crawford*'s rule to the kinds of statements at issue in these cases will lead police to ignore domestic violence calls, because they consider it pointless to intervene if the alleged perpetrator will not be convicted as a result of an arrest. Others suggest that the inadmissibility of these statements give batterers an even greater incentive to prevent victims from testifying. *Amici* fully agree that these are outcomes to avoid and believe jurisdictions should take steps such as those set out above to avoid this result. Moreover, whether a successful prosecution ultimately follows or not, police must continue to provide prompt emergency assistance in domestic violence cases to protect the health and safety of women and their families.

In addition, while domestic violence is a crime deserving vigorous enforcement and punishment, the number of defendants convicted is not the only, or even the most important, measure of success in the struggle against domestic violence. Helping domestic violence victims address their immediate needs for housing, financial support, physical safety, and the like indirectly increases the probability victims will cooperate with prosecution; far more importantly, however, such assistance directly increases the likelihood victims of violence will be able to end violent relationships and protect themselves in the long term. Safety

and autonomy for victims of violence is the ultimate goal of domestic violence policy. While criminal law enforcement is an important piece of such efforts, standing alone it cannot achieve these goals. Communities will be most successful in eradicating domestic violence when they mount a broad response to the problem.

## CONCLUSION

For the reasons stated above, the judgments in *Davis* (05-5224) and *Hammon* (05-5705) should be reversed.

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Nos. 05-5224 and 05-5705

In the
# Supreme Court of the United States

**ADRIAN MARTELL DAVIS,**

*Petitioner,*

v.

**STATE OF WASHINGTON,**

*Respondent.*

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**HERSHEL HAMMON,**

*Petitioner,*

v.

**STATE OF INDIANA,**

*Respondent.*

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**On Writs of Certiorari to the Supreme Court of Washington and the Indiana Supreme Court**

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## BRIEF OF AMICUS CURIAE COOK COUNTY, ILLINOIS IN SUPPORT OF THE RESPONDENTS

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## QUESTIONS PRESENTED

Whether an alleged victim's statements to a 911 operator naming her assailant—admitted as "excited utterances" under a jurisdiction's hearsay law—constitute "testimonial" statements subject to the Confrontation Clause restrictions enunciated in *Crawford v. Washington*, 541 U.S. 36 (2004).

Whether an oral accusation made to an investigating officer at the scene of an alleged crime is a testimonial statement within the meaning of *Crawford v. Washington*, 541 U.S. 36 (2004).

## TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES ..... iii

INTEREST OF *AMICUS* ..... 1

STATEMENT OF THE CASE ..... 1

SUMMARY OF ARGUMENT ..... 2

ARGUMENT ..... 5

I.

THE CONFRONTATION CLAUSE WAS DESIGNED TO GUARD AGAINST GOVERNMENTAL OPPRESSION; THEREFORE, ANY DEFINITION OF THE TERM "TESTIMONIAL" MUST INCLUDE THE GOVERNMENT PRODUCTION OF *EX PARTE* OUT-OF-COURT TESTIMONY ..... 5

II.

THE "TEMPORAL REACH" BACKWARDS OF THE CONFRONTATION CLAUSE WITHIN THE PRE-TRIAL PROCESS SHOULD BE SYNTHESIZED WITH THIS COURT'S ALREADY-DEVELOPED SIXTH AMENDMENT JURISPRUDENCE ..... 22

CONCLUSION ..... 30

## TABLE OF AUTHORITIES

PAGE(S)

***Cases***

*Benton v. Maryland*,
395 U.S. 784 (1969) ..... 18

*Bourjaily v. United States*,
483 U.S. 171 (1987) ..... 7, 12

*California v. Green*,
399 U.S. 149 (1970) ..... 6, 7

*Coy v. Iowa*,
487 U.S. 1012 (1988) ..... 6

*Crawford v. Washington*,
541 U.S. 36 (2004) ..... *passim*

*Doe v. United States*,
487 U.S. 201 (1988) ..... 18

*Duncan v. Louisiana*,
391 U.S. 145 (1968) ..... 16, 17

*Dutton v. Evans*,
400 U.S. 74 (1970) ..... 11

*Faretta v. California*,
422 U.S. 806 (1975) ..... 15

*Gerstein v. Pugh*,
420 U.S. 103 (1975) ..... 25

*Hurtado v. California*,
110 U.S. 516 (1884) ..... 19

*Idaho v. Wright*,
497 U.S. 805 (1990) ..... 7

*In re Oliver*,
333 U.S. 257 (1948) ..... 16

*Kentucky v. Stincer*,
482 U.S. 730 (1987) ..... 2, 6, 7

*Kirby v. Illinois*,
406 U.S. 682 (1972) ..... 25

*Klopfer v. North Carolina*,
386 U.S. 213 (1967) ..... 15-16, 28

*Lee v. Illinois*,
476 U.S. 530 (1986) ..... 6

*Lilly v. Virginia*,
527 U.S. 116 (1999) ..... 6, 7

*Maine v. Moulton*,
474 U.S. 159 (1985) ..... 26

*Malloy v. Hogan*,
378 U.S. 1 (1964) ..... 18

*Maryland v. Craig*,
497 U.S. 836 (1990) ..... 6, 7

*Michigan v. Jackson*,
475 U.S. 625 (1986) ..... 26-27

*Moran v. Burbine*,
475 U.S. 412 (1986) ..... 27

*Ohio v. Roberts*,
448 U.S. 56 (1980) ..... 2, 6, 7

*Reid v. Covert*,
354 U.S. 1 (1957) ..... 19, 21

*Ring v. Arizona*,
536 U.S. 584 (2002) ..... 16

*Singer v. United States*,
380 U.S. 24 (1965) ..... 16

*State v. Barnes*,
854 A.2d 208 (Me. 2004) ..... 23

*Taylor v. Illinois*,
484 U.S. 400 (1988) ..... 17

*United States v. Ash*,
413 U.S. 300 (1973) ..... 25-26

*United States v. Gouveia*,
467 U.S. 180 (1984) ..... 26, 29

*United States v. Marion*,
404 U.S. 307 (1971) ..... 28, 29

*United States ex rel. Toth v. Quarles*,
350 U.S. 11 (1955) ..... 19

*United States v. Reid*,
53 U.S. 361 (1851) ..... 14

*United States v. Wade*,
388 U.S. 218 (1967) ..... 24

*Washington v. Texas*,
388 U.S. 14 (1967) ..... 16

*White v. Illinois*,
502 U.S. 346 (1992) ..... 7

**Constitutional Provisions**

Art. III, § 2 ..... 16

U.S. Const., amend VI ..... 5, 15

**Other Authorities**

Akhil Reed Amar, *The Bill of Rights as a Constitution*,
100 Yale L.J. 1131 (1991) ..... 17

Akhil Reed Amar, *Confrontation First Principles: A Reply to Professor Friedman*,
86 Geo. L.J. 1045 (1998) ..... 14

Margaret A. Berger, *The Deconstitutionalization of the Confrontation Clause: A Proposal for a Prosecutorial Restraint Model*,
76 Minn. L. Rev. 557 (1992) ..... 17, 18

Edward J. Imwinkelried, *The Constitutionalization of Hearsay: The Extent to Which the Fifth and Sixth Amendments Permit or Require the Liberalization of Hearsay Rules*, 76 Minn. L.

Randolph N. Jonakait, *Notes for a Consistent and Meaningful Sixth Amendment*, 82 J. Crim. L. & Criminology 713 (1992) ..... 17

Roger W. Kirst, *The Procedural Dimension of Confrontation Doctrine*, 66 Neb. L. Rev. 485 (1987) ..... 14, 15

## INTEREST OF AMICUS

*Amicus* is the County of Cook, Illinois, within which the Criminal Division of the Cook County Circuit Court constitutes one of the most active criminal court systems in the country. The Cook County State's Attorney is the chief legal officer of Cook County and is constitutionally and statutorily charged with the duty to prosecute all criminal actions in the circuit court for his county. The outcome of the litigation in the two cases before this Court will have a direct impact on the prosecutions in Cook County and will significantly affect the execution of the Cook County State's Attorney's duties. As the legal representative of a unit of state government, Supreme Court Rule 37 allows *Amicus* to file a supporting brief without permission of the parties. Therefore, Cook County, Illinois respectfully submits this brief as *Amicus Curiae* in support of Respondents.

## STATEMENT OF THE CASE

*Amicus* adopts the Statements of the Cases presented by Respondent State of Washington in *Davis*, No. 05-5224 and Respondent State of Indiana in *Hammon*, No. 05-5705 in their respective merits briefs.

## SUMMARY OF ARGUMENT

In *Crawford v. Washington*, 541 U.S. 36 (2004), this Court redefined the "spatial reach" of the Confrontation Clause as it relates to out-of-court statements. The pre-*Crawford* paradigm, represented by *Ohio v. Roberts*, 448 U.S. 56 (1980), presupposed that the Clause reached *all* witness statements—both in-court and out-of-court. Therefore, the Clause's purpose was defined singularly in terms of a "'functional' right designed to promote reliability in the truth-finding functions of a criminal trial." *Kentucky v. Stincer*, 482 U.S. 730, 737 (1987). In the context of out-of-court statements, the question became whether the "truth-finding functions of a criminal trial," which devolved into a synonym for cross-examination, were "functionally-served" by something inherent in the class of hearsay evidence under consideration. If so, "cross-examination by substitution" had been effected and the Clause was not offended.

*Crawford* leaves intact the body of jurisprudence emanating from the "truth-finding functions of a criminal trial" in the context of in-court testimony and those out-of-court statements that are "testimonial" and, therefore, subject to the "spatial reach" of the Clause. *Crawford*, however, greatly constricted the "spatial reach" of the Clause with respect to out-of-court statements. No longer were the "truth-finding functional rights" operative at trial the lodestar. Rather, through the interpretive methodology of original meaning construction, this Court determined that the Framers *enlisted the aid* of these "truth-finding functions" to effectuate a very different purpose in the realm of out-of-court statements—to guard against *the government* creating "out-of-court testimony" against the accused *ex parte* and then introducing it at trial in lieu of live testimony. *Crawford*, 541 U.S. at 50. Based on experience, the Framers knew that this abuse could be unchecked by a less than impartial judicial gatekeeper.

The Confrontation Clause envisioned by the Framers, therefore, closed the door to this particular brand of governmental abuse by demanding that one who utters this "specific type of out-of-court statement" (*Id.* at 51) be seen for what he is—a "witness against" the "accused." The out-of-court statement, *judged from the moment of its creation*, is then and there the "functional equivalent" of in-court testimony and is, therefore, deemed "testimonial." It is the category of "testimonial" statements that defines the "spatial reach" of the Clause with respect to out-of-court statements. Once identified as "testimonial," the Clause demands that the out-of-court statement be subject to the same "truth-finding functional rights" operative at trial. Unless the government either brings the witness in or the accused had a prior opportunity to cross-examine the witness, the Clause operates as a categorical bar.

Thus, while the Confrontation Clause does enshrine "the truth-finding functional rights" that are fundamental to our adversarial system, the Clause has a decidedly different purpose in the realm of out-of-court statements. Here, the Clause was designed to act as a check on a very specific type of governmental abuse—conducting pre-trial *ex parte* examinations of witnesses and, thereby, creating evidence that would be used against the accused at trial. The foundational premises of both Petitioners' arguments, therefore, are in error. The definition of "testimonial" should not be defined in order to vindicate the "truth-finding, functional rights" of the Clause, as did the pre-*Crawford* paradigm and as Petitioners now advance. The definition of "testimonial" must logically be defined in terms of vindicating the purpose already identified by this Court in *Crawford* of acting as a check on governmental overreaching. Thus, the definition of "testimonial" cannot be unmoored from the very purpose of the Clause. It is within the confines of this purpose that this Court must assess whether the 911 call in *Davis* (No. 05-5224) and the crime disclosure statement in *Hammon* (No.

05-5705) are swept within the "spatial reach" of the Confrontation Clause as envisioned by our Framers.

This purpose of the Clause is reinforced by assessing its individual role in the overall purpose of the Sixth Amendment itself, the Bill of Rights as a whole and, indeed, the entire body of our Constitution. Employing the same original meaning interpretive methodology, in conjunction with constitutional construction principles, the Confrontation Clause's role within the larger constitutional body of guarding against governmental abuse emerges as the animating principle. The Framers envisioned a systemic response to governmental abuse—with each particular provision serving its designed purpose. To press the Clause into service to do the "heavy-lifting" in areas outside of its intendment would do damage to the overall balanced design. Therefore, when refining the definition of "testimonial," the Confrontation Clause simply cannot be unmoored from its overall purpose, particularly when there are other constitutional provisions better-suited and intended to accommodate the systemic concerns expressed by Petitioners.

This same interpretive methodology must also be employed to ascertain the "temporal reach" of the Confrontation Clause. Just as the Framers defined the "spatial reach" of the Clause, as it relates to out-of-court statements, by use of the phrase "witnesses against," the Framers also tied the "temporal reach" of the Clause to the term "accused" and the phrase "criminal prosecution." This text was deliberately employed by the Framers to extend the "temporal reach" of the Clause to effectuate its purpose. Neither the status of "accused," nor the "criminal prosecution" itself extends infinitely backwards. The history out of which the Clause was borne was the "pre-trial, *ex parte*" abuses of the government in creating and using out-of-court statements. Therefore, a "testimonial" statement must be "created" at some point on the investigatory/prosecutorial timeline when the

machinery of the State was focusing upon the "accused" as an "accused."

Through the same interpretive methodology employed to ascertain the "spatial reach" of the Clause, this Court can now flesh-out its "temporal reach." Moreover, this Court can and should synthesize its interpretation with its already-existing Sixth Amendment jurisprudence, which teaches that the purpose served by the individual right identifies the place on the timeline when the right is triggered. However, these Sixth Amendment rights all share the common principle that they are somehow tied to the "accused" as an "accused" within the machinery of a "criminal prosecution." Based on this interpretive methodology, both the 911 call *(Davis,* No. 05-5224) and the crime disclosure statement *(Hammon,* No. 05-5705) fall outside of the outer-limits of the "temporal reach" of the Confrontation Clause.

## ARGUMENT

### I. THE CONFRONTATION CLAUSE WAS DESIGNED TO GUARD AGAINST GOVERNMENTAL OPPRESSION; THEREFORE, ANY DEFINITION OF THE TERM "TESTIMONIAL" MUST INCLUDE THE GOVERNMENT PRODUCTION OF *EX PARTE* OUT-OF-COURT TESTIMONY.

The Confrontation Clause provides, "In all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him." U.S. Const., amend. VI. In *Crawford v. Washington*, 541 U.S. 36 (2004), after over a quarter century of jurisprudence, this Court did an "about face" and reunited the Clause with its historical roots. Based upon an interpretive methodology of original meaning construction, through history, historical inference

and adherence to the text itself, this Court concluded that its previous presuppositions about the Clause, represented by *Ohio v. Roberts*, 448 U.S. 56 (1980), were unsupportable. The *Crawford* Court, therefore, threw out the entire pre-*Crawford* paradigm and instituted an entirely new framework that represented the true design of the Framers.

The pre-*Crawford* paradigm was premised upon the notion that the Clause was all-encompassing, reaching *all* witness statements—both in-court and out-of-court. Driven by Wigmore's postulate (*Coy v. Iowa*, 487 U.S. 1012, 1028-1029 (1988) (Blackmun, J., dissenting)), the Court reasoned that cross-examination was the "primary interest secured by [the Confrontation Clause]" because it is "critical for ensuring the integrity of the factfinding process." *Kentucky v. Stincer*, 482 U.S. 730, 736 (1987). Cross-examination and the other "implications of the Confrontation Clause" (*Maryland v. Craig*, 497 U.S. 836, 863 (1990) (Scalia, J., dissenting))—placing the witness under oath and permitting the jury to look upon the witness' demeanor as he testifies (*California v. Green*, 399 U.S. 149, 158 (1970))—combined to "ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact." *Lilly v. Virginia*, 527 U.S. 116, 123-124 (1999). Under this framework, the Confrontation Clause served to "protect[] * * * essentially a 'functional' right designed to promote reliability in the truth-finding functions of a criminal trial." *Stincer*, 482 U.S. at 737. The right of confrontation was found to be "an essential and fundamental requirement for the kind of trial which is this country's goal." *Lee v. Illinois*, 476 U.S. 530, 540 (1986).

Ironically, these purposes of the Clause, clearly effectual only if the witness actually took the witness stand at trial, were offered as the rationale for permitting and assessing out-of-court statements under the aegis of the Clause. The

reasoning went—if cross-examination is the purpose, and reliability is the goal, then an out-of-court statement can be sufficiently reliable to pass muster under the Clause if it "possess[es] indicia of reliability by virtue of its inherent trustworthiness" (*Idaho v. Wright*, 497 U.S. 805, 822 (1990)) such that "adversarial testing can be expected to add little to its reliability" (*White v. Illinois*, 502 U.S. 346, 357 (1992)). However, "[t]his reasoning abstracts from the right to its purposes, and then eliminates the right." *Craig*, 497 U.S. at 863 (Scalia, J., dissenting).

Pre-*Crawford* jurisprudence deliberately persevered in this fiction for more than a quarter century, finding it increasingly more and more difficult to develop a body of cohesive precedent. Moreover, the Court persisted in this paradigm, complete with multiple occasions of outright refusal to pay heed to the historical forces which drove the Framers to enshrine the Clause in the Bill of Rights in the first instance and/or the text of the Clause itself. See, *e.g.*, *Green*, 399 U.S. at 156-158; *Roberts*, 448 U.S. at 62-64; *Bourjaily v. United States*, 483 U.S. 171, 181-182 (1987); *Stincer*, 482 U.S. at 739-740; *White*, 502 U.S. at 352-353; *Lilly*, 527 U.S. 116. In its zeal to arrogate onto the Confrontation Clause the ability to monitor *all* hearsay, the Court in *White* went so far as to actually reject the Framers' own words in the text of the Clause because "[s]uch a narrow reading of the Confrontation Clause, [] would virtually eliminate its role in restricting the admission of hearsay testimony." *White*, 502 U.S. at 352.

In short, the pre-*Crawford* paradigm suffered from multiple logical systemic errors—all directly due to the preconceived desire to monitor all hearsay under the rubric of the Confrontation Clause. This framework simply refused to account for history, text, or purpose in construing the Clause. This Court, by employing an original meaning interpretive methodology, rectified the logical errors upon

which the pre-*Crawford* framework was premised and realigned the Clause with the Framers' intendment.

After an extensive review of the history of both England and the colonial periods leading up to the passage of the Bill of Rights, the Court determined that the "the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused." *Crawford*, 541 U.S. at 50. That is not to deny the laudable trial purposes of the Clause upon which the pre-*Crawford* body of jurisprudence rested. Certainly, these purposes are entirely accurate with respect to in-court testimony and those out-of-court statements that are found to come within the protective reaches of the Clause. This Court simply rejected these trial-related goals outright as somehow justifying if or how a particular out-of-court statement came within the rubric of Confrontation Clause scrutiny. What is clear is that the Framers did not erect the Confrontation Clause as a "reliability-gauge" for all out-of-court hearsay, as the pre-*Crawford* paradigm presupposed. Rather, through resort to the very history which forged the constitutional right and the Framers' expression of their intent through the text of the Clause itself, this Court concluded that the Confrontation Clause, with respect to out-of-court statements, was actually erected as a barrier against governmental abuse.

Certainly, post-*Crawford*, in the context of the trial itself, the Clause still represents "an affirmative guarantee that testimony introduced against an accused must be given under a prescribed procedure," as Petitioner Hammon rightly points out. (*Hammon*, No. 05-5705, Br. at 7; See also *Davis*, No. 5-5224, Br. 17, 35) Indeed, cross-examination and the other "implications of the Confrontation Clause"—the premises upon which the pre-*Crawford* paradigm were based—still represent the implicit "affirmative guarantees of the procedure described" (*Hammon*, No. 05-5705, Br. at 9)

within the Clause under the *Crawford* framework. This Court left the "truth-finding functions of a criminal trial" purpose intact with respect to in-court testimony. Obviously, the Clause affords an "accused" during the very "criminal proceeding" at which the "witness against" him is testifying the full protection of the procedural guarantee.

Moreover, *Crawford* "once again reject[ed] the view that the Confrontation Clause applies of its own force only to in-court testimony." *Id.* at 50. Thus, *when* an out-of-court statement (offered substantively) is deemed to come within the protective reaches of the Clause, these same "truth-finding functions of a criminal trial" are fully requisite, as well. Without either the witness on the stand or a prior opportunity for cross-examination and unavailability, the Clause erects a categorical barrier to the admission of that particular out-of-court statement.

However, the essential premise of both Petitioners and their *Amici*, that these "truth-finding functions" should be the benchmark for assessing *whether* an out-of-court statement should be swept within the "spatial reach" of the Clause, suffers from the same logical infirmity as the pre-*Crawford* paradigm. *Crawford* rejected this rationale outright because the history and text of the Clause demonstrated that *whether* an out-of-court statement came within the "spatial reach" of the Clause in the first instance was judged by a very different standard and was motivated by a very distinct purpose—to guard against the governmental abuse and overreaching that had periodically crept into their adversary system through the implementation of civil-law "controversial examination practices" actively employed by the government and unchecked by the judiciary. *Id.* at 47, 67.

To this end, the Framers enlisted the aid of the common law procedural trial right through the text of the Confrontation Clause to effectuate a very particular purpose with

respect to out-of-court statements—to guard against *the government* creating "out-of-court testimony" against the accused *ex parte*. The abuse began when the government created the "*ex parte* examination" of the witness and was completed when it was introduced "as evidence against the accused" at his trial in lieu of live testimony. In this manner, the government subverted the accused's right to employ, at trial, the arsenal of "truth-finding functions" on a live body on the witness stand. It is this governmental creation of out-of-court testimony in order to end-run the procedural guarantees of the Confrontation Clause at trial that constituted the abuse.

Moreover, the Framers were none too comforted by the fact that the out-of-court, government-created "testimony" would pass through a judicial gate-keeper, given their equal distrust of a judiciary beholden to the King. The reality of this fact played out before their very eyes in the "politically charged cases like Raleigh's—great state trials where the impartiality of even those at the highest level of the judiciary might not be so clear." *Id.* at 67. In short, the Framers "knew that judges, like other government officers, could not always be trusted to safeguard the rights of the people" so "they were loathe to leave too much discretion in judicial hands." *Id.* at 67.

The Confrontation Clause envisioned by the Framers, therefore, closed the door to this particular brand of governmental abuse by demanding that one who utters this "specific type of out-of-court statement" (*Id.* at 51) be seen for what he is—a "witness against" the "accused." As such, when this particular type of out-of-court statement, termed "testimonial," is identified, it is subject to the same trial-type adversarial testing mandated by the Confrontation Clause for in-court testimony. If the witness is not put on the stand or the accused had not had a prior opportunity to subject the out-of-court statement to the rigors of adversarial testing, the statement is categorically barred by the Confrontation Clause.

*Crawford*, therefore, through its original meaning interpretive methodology, attempted to lay out the "common nucleus" and "various levels of abstraction around it" (*Id.* at 51-52) of the "spatial reach" of the Clause—those out-of-court "testimonial" statements that are generated by "the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed" (*Id.* at 68). Petitioners have proposed the following tests to identify these "specific type[s] of out-of-court statements": "whether a reasonable person in the position of the declarant would anticipate use of the statement in investigation or prosecution of a crime" (*Hammon*, No. 05-5705, Br. at 7) and "whether a *reasonable declarant* would have *anticipated* that her statement might be used for law enforcement purposes" (Emphasis in original) (*Davis*, No. 05-5224, Br. at 41). While *Amicus* has grave concerns about these tests for multiple reasons[1], *Amicus* would like to focus particularly upon

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[1] Petitioners' proposed tests are decidedly atextual and ahistorical. Given this Court's methodology of ascertaining the meaning of the phrase "witnesses against," Petitioners' contentions that this phrase seeks to ascertain whether the statement at issue would perform the *function* of testimony when it is introduced at trial (*Hammon*, Br. at 12-13; *Davis*, Br. at 41) misses the mark. The question is whether the out-of-court statement, at the moment of its utterance, *is* the functional equivalent of in-court testimony at the time the statement is made. Petitioners' focus upon content is, again, contrary to the history and text of the Clause. The term "accused" is a very different thing than an "accusation." If Petitioners are correct, then this Court's characterization of the out-of-court accusation in *Dutton v. Evans*, 400 U.S. 74 (1970) as "nontestimonial" (*Crawford*, 541 U.S. at 57) would be error. In addition to the requisite governmental abuse component, what makes the out-of-court statement "testimonial" is the simultaneous understanding of the declarant that he was "bearing witness against the accused" at that time, drawn from the circumstances under which the statement was created. If this were not correct, then

(continued...)

Petitioners' suggestion that the definition of "testimonial" can be completely unhinged from any manner of governmental involvement in the creation of the out-of-court statement. (*Hammon*, No. 05-5705, Br. at 10, 11, 17; *Davis*, No. 05-5224, Br. at 13)

As stated, this conclusion necessarily derives from Petitioners' view of the purpose of the Confrontation Clause, as it relates to out-of-court statements, as a free-roving guarantor of our adversarial principles upon out-of-court statements that might end up in-court as prosecution "testimony." If the out-of-court statement accuses the "accused,"[2] then it should be subject to the rigors of adversarial testing else our adjudicative system will come into disrepute. In other words, Petitioners' theories rest upon the commentary on our adjudicative system that would result should it not be deemed to interpret the term "witnesses against" utilized by the Framers in the manner proposed by Petitioners.

*Amicus* has already pointed out that this rationale shares much in common with the pre-*Crawford* framework already rejected by this Court in *Crawford*. While admittedly packaged somewhat differently, both share the overall premise that the advancement of the truth-determining process is the purpose of the Clause and, therefore, the end in and of itself in the realm of out-of-court statements. More

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(...continued)
this Court's characterization of the declarant's statement to the F.B.I informant in *Bourjaily v. United States*, 483 U.S. 171 (1987) as "nontestimonial" (*Crawford*, 541 U.S. at 58) would be equally called into question. Finally, both proposed tests do not even attempt to account for the "temporal reach" of the Clause, which will be more fully addressed below.

[2] Upon careful scrutiny, the actual tests proposed by Petitioners are not even limited to out-of-court "accusations." For this reason alone, much of Petitioner's rationale surrounding the significance of accusations is not logically integral to their ultimate conclusions.

importantly, however, Petitioners' ideological misgivings aside, this Court has already identified the Framers' intent with respect to the Clause's role in the regulation of out-of-court statements as one of guarding against "the civil-law mode of criminal procedure and particularly its use of *ex parte* examinations as evidence against the accused." *Id.* at 50. While Petitioner Hammon attempts to employ this conclusion to underscore his operating premise (See *Hammon*, No. 05-5705, Br. at 11, n. 7 ("the Court's statement in *Crawford* that 'the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused' (citation) should be interpreted in this light")), his efforts are unavailing for the simple reason that he refuses to accept that this Court has already identified the Framers' purpose with respect to out-of-court statements—a purpose very different than the one upon which Petitioners' arguments are premised.

This Court found that the Clause, within the realm of out-of-court statements, was designed to effect a check against the government's employment and use of civil law, pre-trial examinations of witnesses to end-run the procedural guarantees of the Confrontation Clause. It was the Framers' fear of governmental abuse, both at the hands of the investigatorial/prosecutorial entities, during the pre-trial phase of the "criminal prosecution," and the judiciary, during the trial itself, out of which the Confrontation Clause was forged.[3] The purpose of the Clause, therefore, was not

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[3] Petitioner Hammon asserts that "it is not the police or prosecutors or other questioners who violate the confrontation right." Rather, the abuse occurs "when a court admits the statement in support of a prosecution without the accused having an opportunity to confront the witness." (*Hammon*, No. 05-5705, Br. at 17) In other words, the abuse occurs at trial alone. In reality, (continued...)

simply to glorify the adversarial process in and of itself but, in the specific context of out-of-court statements, to guard against governmental abuse. As a result, the government evidence-producing component simply cannot be written out of the "testimonial" equation.

That guarding against governmental abuse is the animating purpose of the Confrontation Clause, as it relates to out-of-court statements, is clear from this Court's interpretive original meaning methodology employed in *Crawford*. The Confrontation Clause was designed to afford an "accused" a procedural mechanism to effect a balance of power between himself and the machinery of the State so as to "safeguard[] against the restoration of proceedings which were so oppressive and odious while they remained in force." *United States v. Reid*, 53 U.S. 361, 364-365 (1852).

As one commentator aptly explained this, "the procedural dimension," of confrontation doctrine is "based on an unstated assumption that the right of confrontation restricted the ability of the government to create and use hearsay as a substitute for live testimony." Roger W. Kirst, *The Procedural Dimension of Confrontation Doctrine*, 66 Neb. L. Rev. 485, 487 (1987) (hereinafter, "Kirst, *The Procedural Dimension*"). "The use of hearsay most closely resembles trial by affidavit when the hearsay is created by

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Professor Friedman's construct is an effort to account for Professor Amar's earlier observation that Friedman's theory "sidesteps a powerful counterargument rooted in a basic principle of constitutional structure: the Constitution is mainly addressed to state action." Akhil Reed Amar, *Confrontation First Priniciples: A Reply to Professor Friedman*, 86 Geo. L.J. 1045, 1048 (1998). To solve his "state action" problem, Friedman has created another problem—he has ignored the very purpose of the Clause in the realm of out-of-court statements. The abuse consists of *both* the creation of *ex parte* testimony during the pre-trial process *and* the introduction of it at trial.

the government in the investigation or prosecution of the crime." This "procedural dimension," moreover, "has always been an integral, but implicit, part of confrontation doctrine." Kirst, *The Procedural Dimension*, 66 Neb. L. Rev. at 487.

Moreover, this purpose—to keep the power of the government in check—only becomes clearer when viewing this Clause as a component part of the Sixth Amendment itself. The purpose of the Confrontation Clause identified by this Court in *Crawford* fits seamlessly with fundamental principles of constitutional construction on a larger scale. The Clause cannot be interpreted in a vacuum, located as it is within the Sixth Amendment, as a whole, which provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have Assistance of Counsel for his defence." U.S. Const., amend. VI.

Petitioners are correct in the sense that the Sixth Amendment "includes a compact statement of the rights necessary to a full defense[,]" which rights "are basic to our adversary system of criminal justice." *Faretta v. California*, 422 U.S. 806 (1975). However, this Court's jurisprudence with respect to other individual rights within the Sixth Amendment indicates that these, too, were erected by the Framers as a systemic check on governmental abuse. For example, in *Klopfer v. North Carolina*, 386 U.S. 213, 221-222 (1967), this Court found that the Framers viewed the right to speedy trial served to guard against governmental procedures that "indefinitely prolong[ed]" the "oppression" inherent in the

"pendency of [an] indictment." The right to a public trial, emanating from the "Anglo-American distrust for secret trials has been ascribed to the notorious use of this practice * * * * [by] institutions [which] obviously symbolized a menace to liberty," was "recognized as a safeguard against any attempt to employ ours courts as instruments of persecution" because "[t]he knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power." *In re Oliver*, 333 U.S. 257, 268-269 (1948). Similarly, this Court, based upon an assessment of the history of jury trial at the time of our Founding Fathers, stated that "the guarantees of jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which law should be enforced and justice administered. A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government." *Duncan v. Louisiana*, 391 U.S. 145, 155 (1968). See also *Singer v. United States*, 380 U.S. 24, 31 (1965) (Art. III, § 2 jury trial clause "was clearly intended to protect the accused from oppression by the Government"); *Ring v. Arizona*, 536 U.S. 584, 611-612 (2002) (Scalia, J., concurring).[4]

The Framers deliberately elected to "bundle" these Sixth Amendment rights together as a package. This Court has employed the same interpretive methodology in discerning the Framers' intent with respect to these other Sixth Amendment rights and came to the same conclusion as it did in *Crawford* with respect to the Confrontation Clause: that these Sixth Amendment rights, the defining characteristics

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[4] The Compulsory Process Clause, too, was enshrined in the Bill of Rights to guard against governmental oppression. This Clause was included in the Sixth Amendment "in reaction to the notorious common-law rule that in cases of treason or felony the accused was not allowed to introduce witnesses in his defense at all." *Washington v. Texas*, 388 U.S. 14, 19 (1967).

of our adversary system, were also enshrined by the Framers to act as checks on governmental overreaching in both the executive and judicial departments.

Moreover, grouped, as they are, within the Sixth Amendment as a package, "each Sixth Amendment guarantee should be interpreted in light of the rest of the Sixth Amendment," the "package" of personal procedural guarantees "dovetail[s] to construct a forum that will not only find facts, but will also be a check on governmental overreaching." Randolph N. Jonakait, *Notes for a Consistent and Meaningful Sixth Amendment*, 82 J. Crim. L. & Criminology 713, 734-735 (1992). In short, the Confrontation Clause plays a "supporting role * * * in restraining the capricious use of government power." Margaret A. Berger, *The Deconstitutionalization of the Confrontation Clause: A Proposal for a Prosecutorial Restraint Model*, 76 Minn. L. Rev. 557, 560 (1992) (hereinafter, "Berger, *Prosecutorial Restraint*"); See also *Taylor v. Illinois*, 484 U.S. 400, 410 (1988) (Sixth Amendment rights, with the exception of compulsory process, "shield the defendant from potential prosecutorial abuses"); *Duncan*, 391 U.S. at 154 ("Those who emigrated to this country from England brought with them this great privilege [of jury trial] 'as part of their birthright and inheritance, as a part of that admirable common law which had fenced around and interposed barriers on every side against the approaches of arbitrary power.'") (citations omitted).

This interpretation of the Clause is given further textual support by its location within the Bill of Rights. In the words of commentator Akhil Reed Amar, "much is lost by the clause-bound approach that now dominates constitutional discourse." Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 Yale L.J. 1131 (1991). "Perhaps as a consequence of the parceling out of constitutional issues among several law school courses, the particular guarantees of the amend-

ments have been studied in a fragmented manner that obscures the grand design of the Bill of Rights and its relationship to the Constitution, and is at odds with ordinary canons of statutory analysis." Berger, *Prosecutorial Restraint*, 76 Minn. L. Rev. at 560.

Thus, again in keeping with fundamental constitutional construction principles, the Confrontation Clause must also be interpreted in conjunction with the Bill of Rights and, indeed, the Constitution as a whole. It has been said that "the Bill of Rights was never intended to serve as a source of government power. Rather, its *raison d'etre* is to function as a limitation on that power." Edward J. Imwinkelried, *The Constitutionalization of Hearsay: The Extent to Which the Fifth and Sixth Amendments Permit or Require the Liberalization of Hearsay Rules*, 76 Minn. L. Rev. 521, 538 (1992). "The Bill of Rights [is] a political document with a principal objective of restraining the power of the government *vis-a-vis* the individual." Berger, *Prosecutorial Restraint*, 76 Minn. L. Rev. at 561; See also *Benton v. Maryland*, 395 U.S. 784, 795-796 (1969) ("underlying notion" of the Double Jeopardy Clause, that "the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense" is one that "has from the very beginning been part of our constitutional tradition"); *Doe v. United States*, 487 U.S. 201, 212 (1988) (Fifth Amendment privilege against self incrimination, "[h]istorically, * * * was intended to prevent the use of legal compulsion to extract from the accused a sworn communication of facts which would incriminate him" and, therefore, "[t]he major thrust of the policies undergirding the privilege is to prevent such compulsion."); *Malloy v. Hogan*, 378 U.S. 1, 22 (1964) ("It follow[s] from the recognition that due process encompassed the fundamental safeguards of the individual against the abusive exercise of governmental power that some of the restraints on the Federal Government which were specifically enumerated in the Bill of

Rights applied also against the States."); *Reid v. Covert*, 354 U.S. 1, 44 (1957) (Frankfurter, J., concurring) ("The Constitution is an organic scheme of government to be dealt with as an entirety. A particular provision cannot be dissevered from the rest of the Constitution.").

Again, this Court's jurisprudence bears this out. In *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 16 (1955), this Court explained that "[t]he Constitution and the Amendments in the Bill of Rights show that the Founders were not satisfied with leaving determination of guilt or innocence to judges, even though wholly independent [by virtue of Article III]. * * * * Other safeguards designed to protect defendants against oppressive governmental practices were included." Similarly, in *Hurtado v. California*, 110 U.S. 516, 531-532 (1884), this Court early on recognized that:

> "[t]he concessions of Magna Charta were wrung from the King as guarantees against the oppressions and usurpations of his prerogative. * * * * In this country written constitutions were deemed essential to protect the rights and liberties of the people against the encroachments of power delegated to their governments, and the provisions of Magna Charta were incorporated into Bills of Rights. They were limitations upon all the powers of government, legislative as well as executive and judicial."

Perhaps *Amicus*' point could not be better encapsulized by the following statement by this Court: "The rights and liberties which citizens of our country enjoy are not protected by custom and tradition alone, they have been jealously preserved from the encroachments of Government by express provisions of our written Constitution," which this Court described as "the remarkable collection of 'Thou shalt nots' which were explicitly fastened on all departments and agencies of the Federal Government by the Constitution and its Amendments." *Reid v. Covert*, 354 U.S. at 6-7, 9.

Therefore, fundamental principles of constitutional construction lend further support to the fact that the *Crawford* Court correctly viewed the Confrontation Clause as a check on governmental oppression in the realm of out-of-court statements. The Clause, like the remainder of the Sixth Amendment, the Bill of Rights and the Constitution itself, was designed to guard against the government abuse while acting within its awesome powers against the individual. In perfect harmony with this design, this Court in *Crawford* identified the historical force which drove the Clause: the "involvement of government officers in the production of testimony with an eye toward trial [that] presents unique potential for prosecutorial abuse—a fact borne out time and time again throughout a history with which the Framers were keenly familiar." *Crawford*, 541 U.S. at 56, n. 7. It was not abuse by the executive body alone, however, that the Framers employed the Confrontation Clause to check. The Framers "knew that judges, like other government officers, could not always be trusted to safeguard the rights of the people" and they were, therefore, "loathe to leave too much discretion in judicial hands." *Id.* at 67-68. The Confrontation Clause, therefore, erects a categorical barrier against the creation of *ex parte* testimony by the executive body against the accused because the Framers also "had an eye toward politically charged cases like Raleigh's—great state trials where the impartiality of even those at the highest level of the judiciary might not be so clear." *Id.* at 68.

Thus, to suggest, as Petitioners do, that the definition of "testimonial" statements need not include any government-production-of-evidence component is simply error of the highest degree. Their premise, that our system of adversarial adjudication might be compromised if this Court were to faithfully interpret the purpose of the Confrontation Clause as a check on governmental oppression in the realm of out-of-court statements simply misses the mark.

Whether or not Petitioners like it, this is the adversarial system that our Framers set up—one that was forged from a distinct historical focus and purpose and defined specifically by the actual words of the text of the Clause itself and its role within the larger constitutional scheme. To interpret the Clause in the manner Petitioners advocate would drag it out of its natural role within the system set up by the Framers and require it to do all the "heavy lifting" outside of its natural intendment. Petitioners neglect to account for the fact that other constitutional provisions were designed to and are better-suited to accommodate Petitioners' concerns. As discussed above, the Constitution itself was designed by the Framers to *systemically* guard against governmental oppression—a system that operates most effectively when each provision operates within its own sphere and according to its own purpose and design.

This Court has already identified the purpose of the Confrontation Clause within this system: to guard against "the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused." *Id.* at 50. As this Court recognized long ago,

> "Legal doctrines are not self-generated abstract categories. * * * They have a specific juridical origin and etiology. They derive meaning and content from the circumstances that gave rise to them and from the purposes they were designed to serve. To these they are bound as is a live tree to its roots." *Reid v. Covert*, 354 U.S. at 50 (Frankfurter, J., concurring).

*Amicus*, therefore, urges this Court not to unmoor the definition of "testimonial" from the purpose and intendment of our Framers, as Petitioners would have this Court do.

## II. THE "TEMPORAL REACH" BACKWARDS OF THE CONFRONTATION CLAUSE WITHIN THE PRE-TRIAL PROCESS SHOULD BE SYNTHESIZED WITH THIS COURT'S ALREADY-DEVELOPED SIXTH AMENDMENT JURISPRUDENCE.

In *Crawford v. Washington*, 541 U.S. 36 (2004), this Court employed an original meaning interpretive methodology to ascertain the "spatial reach" of the Confrontation Clause as it relates to out-of-court statements, by focusing upon the purpose of the Clause and the text itself with respect to the phrase "witnesses against." *Amicus* now urges this Court to address itself to the "temporal reach" of the Clause by employing this same methodology to ascertain the meaning of the term "accused" and the phrase "criminal prosecution." Fortunately, this Court has already built up a large body of jurisprudence in this regard with respect to several other constitutional rights contained also in the Sixth Amendment. In keeping with the principles of constitutional construction, *Amicus* urges this Court to synthesize the meaning of these phrases within the Confrontation Clause with the already-developed principles of Sixth Amendment jurisprudence, generally.

The Framers employed the phrase "witnesses against" within the text of the Clause to delimit what type of out-of-court statements come within its reach. *Crawford*, in essence, was a roadmap for identifying "the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed." *Id.* at 68. Because *Crawford* focused on the crucial phrase "witnesses against," it sought to identify the *qualities* that a particular out-of-court statement must possess in order to come within the "spatial reach" of the Clause.

The text of the Clause, however, also contains terminology identifying the "temporal reach" of the Clause. An *ex parte* statement and "controversial examination practices" (*Id.* at 47)—necessarily presuppose "parties," in the first instance, and "involvement of government officers in the production of

testimony with an eye toward trial" (*Id.* at 56, n. 7), in the second instance. These phrases, of necessity, carry with them temporal qualities, identifying the relative place on the investigatory/prosecutorial timeline during which an out-of-court statement must be produced in order to qualify as "testimonial." The two "reaches" of the Clause—both spatial and temporal—in fact, dovetail to identify a relative point on the investigatory/prosecutorial timeline that a statement must be uttered in order to qualify as "testimonial."

Thus, any test for the definition of "testimonial" must also account for the "temporal reach" of the Clause intended by the Framers. Surely, the history and historical inferences of the Clause identified in *Crawford* indicate that the statements must come into existence during the *pre-trial* process—at some point in time when the government, police or prosecutor— is actually preparing its case against the accused. If Petitioners are correct in their proposed tests for the definition of a "testimonial" statement, then the absence of any governmental involvement whatsoever would permit the category of out-of-court statements to extend backwards in time to a point outside of the temporal limits of the *pre-trial* process.[5] Petitioner Hammon refers to a scenario where a private party relays information about an offense to another private party before the authorities are even aware of the offense, much less in the *pre-trial* stage of the prosecution. (*Hammon*, No. 05-5705, Br. at 11) Petitioner Davis defines his test in terms of "whether declarants reasonably would have anticipated that their statements might be used for law enforcement purposes." (*Davis*, No. 05-5224, Br. at 13) A statement might be made well in advance of a *pre-trial* stage and still be used, at some point

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[5] In fact, Petitioner Hammon describes a determination that an out-of-court statement was "nontestimonial" as "quite startling" (*Hammon*, No. 05-5705, Br. at 20)—where the statement was made nearly two years *prior* to the offense. See, *Hammon*, No. 05-5705, Br. at 20, n. 20, citing *State v. Barnes*, 854 A.2d 208, 210-12 (Me. 2004).

further along the timeline, "for law enforcement purposes." Quite simply, Petitioners advocate definitions of "testimonial" that are well beyond the reaches of the Clause "spatially," as discussed above, *and* "temporally," as well.[6]

Moreover, the relative point on the investigatory/prosecutorial timeline for an out-of-court statement to come within the "temporal reach" of the Clause is also indicated by an examination of the text of the Clause, as this Court undertook in *Crawford*. In addition to the phrase "witnesses against," which this Court explained in *Crawford*, the Clause also speaks to an "accused" during a "criminal prosecution." This Court, however, has already developed a body of jurisprudence regarding the meaning of these words and their relationship in the context of other Sixth Amendment rights. Therefore, because the term "accused" and the phrase "criminal prosecution" speak commonly to all the Sixth Amendment rights, principles of constitutional construction dictate that the meaning ascribed to this text in the context of the Confrontation Clause must somehow be unified, in principle, with Sixth Amendment jurisprudence.

In *United States v. Wade*, 388 U.S. 218 (1967), this Court addressed itself to the application of the Sixth Amendment right to counsel in the context of a post-indictment lineup, concluding that "the Sixth Amendment guarantee [of counsel] appl[ies] to 'critical' stages of the proceedings." *Id.* at 224.

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[6] As discussed in footnote 3, Petitioner Hammon's position is that the abuse occurs at trial when the court admits the out-of-court statement. This may, superficially, counter Petitioner's "temporal reach" problem. However, Petitioner's entire theory rests upon an erroneous premise, refusing to take this Court's identification of the abuse at which the Clause was directed at face value. The abuse consists of *both* the creation of "*ex parte* examinations" during the pre-trial process *and* the introduction of that examination into evidence at trial. Petitioner cannot obviate his "temporality" problem by simply crafting another purported abuse which happens to occur only at the trial itself.

Finding that the right applied to this government procedure, this Court reasoned that, "in addition to counsel's presence at trial, the accused is guaranteed that he need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial." *Id.* at 226. In refining this principle, however, this Court in *Kirby v. Illinois*, 406 U.S. 682 (1972), explained that the right to counsel is triggered "at or after the initiation of adversary judicial criminal proceedings" because this "is the starting point of our whole system of adversary criminal justice." The *Kirby* Court continued:

> "The initiation of judicial criminal proceedings is far from a mere formalism. It is the starting point of our whole system of adversary criminal justice. For it is only then that the government has committed itself to prosecute, and only then that the adverse positions of government and defendant have solidified. It is then that a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law. It is this point, therefore, that marks the commencement of the 'criminal prosecutions' to which alone the explicit guarantees of the Sixth Amendment are applicable." *Id.* at 689; See *Gerstein v. Pugh*, 420 U.S. 103, 121 (1975) ("Because of its limited function and its nonadversary character, the probable cause determination is not a 'critical stage' in the prosecution that would require appointed counsel.").

Thus, the *Kirby* Court keyed upon the explicit term "criminal prosecutions" within the text of the Sixth Amendment and the purpose of the particular right at issue, in determining how far, temporally, the right to counsel contained in the Sixth Amendment reached backwards on the prosecutorial timeline.

In *United States v. Ash*, 413 U.S. 300 (1973), this Court made explicit what had been implicit in prior precedent. The *Ash*

Court explained that, while the "historical background [of the right to counsel] suggests that the core purpose of the counsel guarantee was to assure 'Assistance' at trial, * * * [l]ater developments have led this Court to recognize that 'Assistance' would be less than meaningful if it were limited to the formal trial itself." *Id.* at 309. Further, "[t]his extension of the right to counsel to events before trial has resulted from changing patterns of criminal procedure and investigation that have tended to generate pretrial events that might appropriately be considered to be parts of the trial itself." *Id.* at 311. However, this Court in *Ash* refused to extend this right to a post-indictment photo display identification, even though it fell within the "temporal reach" of that constitutional provision, because the purpose the right to counsel was designed to serve in the pretrial arena was not at issue in the procedure under scrutiny. *Id.* at 317-321; See also *Maine v. Moulton*, 474 U.S. 159, 176 (1985) ("[T]he Sixth Amendment [right to counsel] is not violated whenever—by luck or happenstance—the State obtains incriminating statements from the accused after the right to counsel has attached.").

Finally, in *United States v. Gouveia*, 467 U.S. 180 (1984), this Court tied the entire jurisprudential rationale for the attachment of the right to counsel to the purpose and text of the Amendment. In declining to find that the right to counsel attached while petitioners were in prison administrative detention but before the return of indictments against them, the Court held fast to its "initiation of adversary judicial proceedings" rule as the point on the prosecutorial timeline in which the right to counsel attaches. The *Gouveia* Court explained, "[t]hat interpretation of the Sixth Amendment right to counsel is consistent not only with the literal language of the Amendment, which requires the existence of both a 'criminal prosecution' and an 'accused,' but also with the purposes which we have recognized that the right to counsel serves." *Id.* at 188; See also *Michigan v. Jackson*, 475 U.S. 625, 632 (1986) ("after a formal accusation has been made—and a person who had

previously been just a 'suspect' has become an 'accused' within the meaning of the Sixth Amendment—the constitutional right to the assistance of counsel is of such importance that the police may no longer employ techniques for eliciting information from an uncounseled defendant that might have been entirely proper at an earlier stage of their investigation.").

Perhaps to make matters clear, this Court subsequently, in *Moran v. Burbine*, 475 U.S. 412 (1986), refused to extend the right to counsel further back in time to a prearraignment confession, even when an attorney retained by the defendant's sister was misled while trying to get in contact with the defendant and in the face of argument that "police questioning often seals a suspect's fate" (*Id.* at 431-432). This Court explained:

> "[The] purpose [of the right to counsel] is to assure that in any 'criminal [prosecution]' (emphasis in original) U.S. Const., Amdt. 6, the accused shall not be left to his own devices in facing the 'prosecutorial forces of organized society.' (citations omitted) By its very terms, it becomes applicable only when the government's role shifts from investigative to accusation. For it is only then that the assistance of one versed in the 'intricacies of the law' (citations omitted) is needed to assure that the prosecution's case encounters 'the crucible of meaningful adversarial testing.' (citation omitted)" *Id.* at 430.

As this body of Sixth Amendment right to counsel jurisprudence reveals, this Court has taken great pains to temporally tie the text of the Sixth Amendment to the particular pre-trial governmental form of oppression against which the right was meant to guard. Because the Sixth Amendment right to counsel is one of "Assistance" at trial, it only reaches back into the pre-trial prosecutorial process to a point where the "government's role shifts from investigative to accusation" because, at this moment—the initiation of adversarial judicial proceed-

ings—counsel is needed to act as an "equalizer" between the machinery of the government and the accused. Without counsel at this point in the process, the "accused's" right to the "Assistance" of counsel at trial would be meaningless. However, and importantly, even if the pre-trial abuse occurs within the "temporal reach" of the right to counsel, the right is not automatically triggered. It is only triggered when the governmental abuse at issue has a nexus to the purpose for which the right was designed.

In the context of another Sixth Amendment right, the right to speedy trial, this Court's rationale remains the same. In *United States v. Marion*, 404 U.S. 307, 314 (1971), this Court stated that, "[o]n its face, the protection of the Amendment is activated only when a criminal prosecution has begun and extends only to those persons who have been 'accused' in the course of that prosecution." However, the *Marion* Court extended this right backward on the investigatory/prosecutorial timeline to "the actual restraints imposed by arrest and holding to answer a criminal charge." *Id.* at 320. In keeping with the methodology devised in the context of the Sixth Amendment right to counsel, because the right to speedy trial served to guard against governmental procedures that "indefinitely prolong[ed]" the "oppression" inherent in the "pendency of [an] indictment" (*Klopfer v. North Carolina*, 386 U.S. 213, 221-222 (1967)), the Court determined that the "public act" on the part of the government in arresting someone would visit oppression upon an arrestee similar to that visited upon one who is charged and, therefore, an "accused." *Id.* at 320. The *Marion* Court, however, refused to extend this right further backwards to pre-indictment because "until [arrest], a citizen suffers no restraints on his liberty and is not the subject of public accusation: his situation does not compare with that of a defendant who has been arrested and held to answer." *Id.* at 321.

Thus, some clear principles emerge from examining this Court's jurisprudence in the context of the Sixth Amendment

rights to counsel and speedy trial. In both cases, this Court recognized the fact that the rights were organized around the "criminal proceeding" itself. The "accused" then is understood to be an "accused," at a point on the investigatory/prosecutorial timeline when the "machinery of the State" trains its sights upon the individual. However, as demonstrated above, this Court has been careful to tie the initiation of the particular right during the pre-trial phase to a point in time, specific to the right itself, when the governmental oppression against which the right serves to guard can jeopardize the trial interests served by the right. In the context of right to counsel, it was "to protect the accused during trial-type confrontations with the prosecutor" (*Gouveia*, 467 U.S. at 190) while, with the right to speedy trial, the purpose was to guard against the oppression inherent in the government's "public act" of arrest (*Marion*, 404 U.S. at 320). However, it is not enough that the purported "abuse" occur within the "temporal reach" of the constitutional provision at issue. The "abuse" must also be committed by the government and must share a nexus with the purpose and abuse against which the particular right was designed to guard.

So, too, should this Court employ this same method of analysis when ascertaining the "temporal reach" backward of the Confrontation Clause, given that it shares the same constitutional amendment as the rights to counsel and speedy trial. This Court should interpret the term "accused" and the phrase "criminal proceeding" in keeping with the history and the purpose the Confrontation Clause was designed by the Framers to serve in the context of out-of-court statements. As the Clause was "directed [at] the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused," (*Crawford*, 541 U.S. at 50), this Court should fix the "temporal reach" of the Clause to a point during the *pre-trial* process when the investigatory/prosecutorial machinery of the State is in a position to produce this type of "examination." However, it is not enough to come within the "temporal reach" of the Clause,

as this Court's Sixth Amendment jurisprudence teaches. The statement must also be created by the government, *ex parte*, with an eye toward the "accused's" "criminal prosecution." In other words, the "spatial reach" of the Clause discussed in Section I of *Amicus*' argument, and the "temporal reach" of the Clause, discussed herein, will necessarily dovetail when an out-of-court statement is truly "testimonial."

Petitioners' position that a "testimonial" statement can be made even prior to the *pre-trial* phase—when the investigatory/prosecutorial machinery of the government has not yet even considered mobilizing against the "accused" to gear up for a "criminal proceeding"—should be rejected out of hand. Wherever this Court decides to fix the "temporal reaches" of the Clause on the investigatory/prosecutorial timeline, both the 911 call (*Davis*, No. 05-5224) and the disclosure of a crime to the first responding officer (*Hammon*, No. 05-5705) clearly fall outside of both the "spatial reach" *and* the "temporal reach" of the Confrontation Clause. In addition to not being government-produced whatsoever and, therefore, not qualitatively "testimonial," in both instances, the investigatory/prosecutorial machinery of the State could not have possibly been focusing upon the defendants as "accuseds" in "criminal prosecutions" within Sixth Amendment jurisprudence. Both the 911 call and the crime disclosure statement were the first revelations to the authorities that a potential crime had even been committed. The police were not even within the pre-trial process when these statements were made, much less focusing upon these men as "accuseds" in preparation for their "criminal prosecutions." The statements simply fall outside of the "temporal reach" of the Confrontation Clause, as defined by history, text, and this Court's own Sixth Amendment jurisprudence.

## CONCLUSION

For the reasons set forth above, this Court should affirm the judgments in *Davis* (05-5224) and *Hammon* (05-5705).

Respectfully submitted,

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Nos. 05-5224 and 05-5705

# In the Supreme Court of the United States

HERSHEL HAMMON, PETITIONER,

*v.*

STATE OF INDIANA, RESPONDENT.

ADRIAN MARTELL DAVIS, PETITIONER,

*v.*

STATE OF WASHINGTON, RESPONDENT.

**On Writs of Certiorari to the Indiana Supreme Court and the Supreme Court of Washington**

## BRIEF FOR THE STATES OF ILLINOIS, ALABAMA, ARIZONA, ARKANSAS, CALIFORNIA, COLORADO, CONNECTICUT, DELAWARE, FLORIDA, HAWAII, IDAHO, KANSAS, MARYLAND, MASSACHUSETTS, MICHIGAN, MISSOURI, NEBRASKA, NEVADA, NEW MEXICO, OHIO, OKLAHOMA, SOUTH DAKOTA, TEXAS, UTAH, VERMONT, WEST VIRGINIA AND WYOMING AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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## QUESTION PRESENTED

Whether an oral accusatory statement made to an investigating officer at the scene of a crime, or a victim's statement to a 911 operator naming her assailant, are governed by *Crawford v. Washington*, 541 U.S. 36 (2004), where the statements qualify as excited utterances under state law.

## TABLE OF CONTENTS

**Page**

QUESTION PRESENTED ..... i

TABLE OF AUTHORITIES ..... iii

INTEREST OF THE *AMICI CURIAE* ..... 1

INTRODUCTION AND SUMMARY OF ARGUMENT . 1

ARGUMENT ..... 4

A. Excited Utterances Of The Kind Admissible At Common Law Are Not Governed By *Crawford* ..... 5

B. Excited Utterances, As Understood In The Modern Era, Are *Per Se* Nontestimonial And Thus Not Governed By *Crawford* ..... 17

CONCLUSION ..... 22

## TABLE OF AUTHORITIES

**Cases:** **Page**

*Alden v. Maine*, 527 U.S. 706 (1999) ..... 17

*Apprendi v. New Jersey*, 530 U.S. 466 (2000) ..... 5, 17

*Atwater v. City of Lago Vista*, 532 U.S. 318 (2001) ... 5, 17

*Aveson v. Kinnaird*, 6 East 188, 102 Eng. Rep. 1258 (1805) ..... 6, 7, 8, 9, 10

*Berkeley Peerage Case*, 4 Camp. 401, 171 Eng. Rep. 128 (1811) ..... 7

*Chambers v. Mississippi*, 410 U.S. 284 (1973) ..... 17

*Commonwealth v. Gonsalves*, 445 Mass. 1, 833 N.E.2d 549 (2005) ..... 21

*Commonwealth v. Hackett*, 84 Mass. (2 Allen) 136 (1861) ..... 9

*Commonwealth v. M'Pike*, 57 Mass. (3 Cush.) 181 (1849) ..... 8, 9, 10, 11

*Crawford v. Washington*, 541 U.S. 36 (2004) ..... *passim*

*Crookham v. State*, 5 W.Va. 510, 1871 WL 2786 (1871) ..... 16

*Croomes v. State*, 40 Tex. Crim. 672, 51 S.W. 924 (1899) ..... 16

*Rex v. Radbourne*, 1 Leach 457 (1787) ..... 11, 14

*Rex v. Wink*, 6 Car. & P. 397, 172 Eng. Rep. 1293 (1834) ..... 16

*Robertson v. Baldwin*, 165 U.S. 275 (1897) ..... 5

*State v. Hill*, 20 S.C.L. 607, 1835 WL 1416 (App. L. 1835) ..... 15

*State v. Horan*, 32 Minn. 394, 20 N.W. 905 (1884) ..... 16

*State v. Middleham*, 17 N.W. 446 (Iowa 1883) ..... 16

*State v. Miller*, 1 Del. Case 512 (1814) ..... 12

*State v. Morea*, 2 Ala. 275, 1841 WL 201 (1841) ..... 12

*State v. Morrison*, 64 Kan. 669, 68 P. 48 (1902) ..... 16

*State v. Murphy*, 16 R.I. 528, 17 A. 998 (1889) ..... 16

*State v. Ohlson*, 125 P.3d 990 (Wash. App. 2005) ..... 21

*State v. Wagner*, 61 Me. 178, 1873 WL 3285 (1873) ..... 16

*State v. Whittier*, 21 Me. 341, 1842 WL 1198 (1842) ..... 12

*Tennessee v. Garner*, 471 U.S. 1 (1985) ..... 5

*Thompson v. Trevanion*, Skin. 402, 90 Eng. Rep. 179 (K.B. 1694) ..... *passim*

*United States v. Arnold*, 410 F.3d 895 (6th Cir.), vacated and superseded on other grounds, ___ F.3d ___ (6th Cir. 2005) ..... 3, 4, 19, 20

*U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995) ..... 17

*Utah v. Evans*, 536 U.S. 452 (2002) ..... 17

*White v. Illinois*, 502 U.S. 346 (1992) ..... 3, 6, 14, 16

*Wilson v. Arkansas*, 514 U.S. 927 (1995) ..... 5

**Constitutional Provisions:**

U.S. const. amend. IV ..... 5

U.S. const. amend. VI ..... *passim*

**Rule:**

Fed. R. Evid. 803(2) ..... 16

**Miscellaneous**:

Comment, *Li'l People, Little Justice: The Effect of the Witness Competency Standard in California on Children in Sexual Abuse Cases*, 22 J. Juv. L. 113 (2001-2002) ..... 12

Thomas Y. Davies, *What Did the Framers Know, and When Did They Know It? Fictional Originalism in* Crawford v. Washington, 71 Brook. L. Rev. 105 (2005) ..... 13, 14, 15

Richard D. Friedman and Bridget McCormack, *Dial-In Testimony*, 150 U. Pa. L. Rev. 1171 (2002) ..... 7

W.S. Holdsworth, *A History of the English Law* (1924) ..... 10

McCormick on Evidence (5th ed. 1999) ..... 17, 18, 19

John E. B. Myers, *Evidence in Child Abuse and Neglect Cases* (1992) ..... 12

S.M. Phillipps, *A Treatise on the Law of Evidence* (1st Am. ed. 1816) ..... 7, 10, 11, 13

The Proceedings of the Old Bailey, London 1674 to 1834, Henrietta Radbourne, t17870711-1 (July 11, 1787), <http://www.oldbaileyonline.org/html_units/1780s/t17870711-1.html> ..... 14, 15

Thomas Starkie, *A Practical Treatise on the Law of Evidence* (1st ed. 1824) ..... 7, 10, 13

Eustachius Strickland, *A Treatise on Evidence* (1830) .... 7

Jone Tran, *Crying Wolf or an Excited Utterance? Allowing Reexcited Statements to Qualify Under the Excited Utterance Exception*, 52 Clev. St. L. Rev. 527 (2004-05) ..... 18

1 N. Webster, *An American Dictionary of the English Language* (1828) ..... 4

John Henry Wigmore, *A Treatise on the System of Evidence in Trials at Common Law* (1904) . 6, 18, 20

Wigmore, *Evidence* (Chadbourn rev. 1976) ..... 19

## INTEREST OF THE *AMICI CURIAE*

These cases ask whether two out-of-court statements — an oral accusation made to a police officer at the scene of a crime, and a victim's statement to a 911 operator naming her assailant — are governed by *Crawford v. Washington*, 541 U.S. 36 (2004), where the statements qualify as excited utterances under state law. Because the 27 State *amici curiae* have traditionally allowed the admission of excited utterances, the decisions here will substantially impact the admissibility of such statements in a wide variety of criminal cases, including those concerning domestic violence and crimes against children.

## INTRODUCTION AND SUMMARY OF ARGUMENT

The Confrontation Clause, as interpreted in *Crawford*, prohibits the admission of "testimonial" out-of-court statements by a declarant absent from trial, unless the declarant is unavailable to testify and the defendant had a prior opportunity for cross-examination. 541 U.S. at 59. This rule is subject to two important limitations. First, *Crawford* does not govern nontestimonial hearsay. *Id.* at 68 ("[w]here nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law"). Second, *Crawford* does not govern hearsay, whether testimonial or not, of a type that was admissible at common law and thus incorporated into the Sixth Amendment. *Id.* at 56 n.6; see also *Mattox v. United States*, 156 U.S. 237, 243 (1895).

These cases concern the admission at trial of out-of-court statements found to qualify as excited utterances under state law. In *Hammon*, a police officer testified that he arrived at a reported domestic disturbance, where the declarant told him that her husband, petitioner Hammon, had just shoved her head into broken glass and twice punched her in the chest. Hammon

J.A. 82. The state appellate court held that the officer's testimony did not violate the Confrontation Clause, reasoning that the declarant's statement was an excited utterance and that excited utterances, by definition, are not testimonial under *Crawford*. *Id.* at 77 ("the very concept of an 'excited utterance' is such that it is difficult to perceive how such a statement could ever be 'testimonial'"). The state supreme court declined to adopt that *per se* rule, *id.* at 95, but held on other grounds — focusing upon the declarant's motivation in speaking to the officer, the officer's motivation in communicating with the declarant, and whether the officer's motivation rendered the communication a species of "police interrogation" whose fruits are subject to *Crawford*, see 541 U.S. at 53-54, 68 — that the statement was nontestimonial. Hammon J.A. 100-104.

In *Davis*, the victim called 911, hung up before saying anything, and then was called back by the 911 operator, who asked what was happening. Davis J.A. 117. The victim "was hysterical and crying as she responded, 'He's here jumpin' on me again,'" and identified petitioner Davis as her assailant. *Ibid.* The victim did not appear at trial, and the trial court, over Davis's objection, admitted a tape recording of the 911 call under the excited utterance doctrine. *Id.* at 118. The state appellate court affirmed, applying the then-applicable framework of *Ohio v. Roberts*, 448 U.S. 56 (1980). Davis J.A. 96-111. While the matter was on appeal to the state supreme court, *Crawford* was decided. *Id.* at 120. The state supreme court held that admitting the 911 tape did not violate *Crawford*. Noting that a California intermediate appellate court had held that "it is difficult to perceive any circumstances under which a statement qualifying as an excited utterance would be testimonial," *id.* at 125 (citing *People v. Corella*, 122 Cal. App. 4th 461, 18 Cal. Rptr. 3d 770 (2004)), the state supreme court, like its counterpart in *Hammon*, did not adopt a *per se* rule in that regard. Rather, the court focused on the declarant's

motivation when speaking to the 911 operator in holding that her statement was not testimonial. Davis J.A. 125-128.

Both state supreme courts were correct to rule that the statements were properly admitted, and the grounds articulated by respondents Indiana and Washington amply support the judgments below. However, to conclude that the declarants' statements were proper under *Crawford*, this Court need not examine, let alone resolve, potentially difficult questions regarding the officer's and 911 operator's respective motivations in communicating with the declarants and whether their motivations rendered the communications "police interrogations" within the meaning of *Crawford*. Rather, for purposes of these cases, this Court need only hold that excited utterances are *per se* not governed by *Crawford*. See *United States v. Arnold*, 410 F.3d 895, 914-15 (6th Cir.) (Sutton, J., dissenting) (the number of excited utterances that are testimonial "may be something approaching a null set"), vacated and superseded on other grounds, ___ F.3d ___, 2005 WL 3315297 (6th Cir. Nov. 23, 2005).

Resolving these cases in that manner would comport with history, square with *Crawford*'s analysis and description of what it means for a statement to be "testimonial," and respect the States' development and implementation over the past two centuries of the excited utterance doctrine. With respect to history, because excited utterances were admissible at common law, see *White v. Illinois*, 502 U.S. 346, 356 n.8 (1992) (citing *Thompson v. Trevanion*, 90 Eng. Rep. 179 (K.B. 1694)), their admission is not prohibited by the Sixth Amendment. See *Mattox*, 156 U.S. at 243. The fact that cases decided in the decades after the Founding regularly admitted (what we now call) excited utterances, and that early nineteenth century treatises recognized excited utterances as an exception to the general rule against hearsay, indicates that such statements were not considered at the time to violate a defendant's constitutional

rights. And because the States have traditionally allowed excited utterances into evidence at criminal trials, subjecting such evidence to the rule set forth in *Crawford* would substantially disrupt long-settled practice.

The excited utterance doctrine has evolved since the Founding, but in a direction that confirms the conclusion that excited utterances are not governed by *Crawford*. At common law, statements now known as excited utterances were admissible as *res gestae*, on the ground that they were a natural continuation of some exciting event. In the modern era, excited utterances are understood to result from spontaneous reactions to stressful events, made without reflective thought or deliberation. A statement that qualifies as an excited utterance is necessarily and fundamentally incompatible with *Crawford*'s understanding of "testimony," which is "'[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.'" 541 U.S. at 51 (quoting 1 N. Webster, *An American Dictionary of the English Language* (1828)); see *Arnold*, 410 U.S. at 914 (Sutton, J., dissenting) ("It is very difficult to imagine a 'solemn' excited utterance or even a semi-solemn excited utterance.").

## ARGUMENT

### EXCITED UTTERANCES ARE NOT GOVERNED BY *CRAWFORD V. WASHINGTON*, 541 U.S. 36 (2004).

Excited utterances are not governed by *Crawford* for two separate reasons. First, because excited utterances were admissible as an exception to the hearsay rule at common law, the exception was incorporated into the Sixth Amendment; this means that excited utterances, as understood at common law, fall outside *Crawford*'s scope regardless of whether they are testimonial. Second, excited utterances, as understood in the modern era, are nontestimonial within the meaning of

*Crawford*, and thus fall outside of *Crawford*'s scope regardless of whether they would have been admissible at common law.

### A. Excited Utterances Of The Kind Admissible At Common Law Are Not Governed By *Crawford*.

This Court looks to common law practice at the time of the Framing to ascertain the scope of the various provisions of the Bill of Rights. See, *e.g.*, *Atwater v. City of Lago Vista*, 532 U.S. 318, 326-344 (2001); *Apprendi v. New Jersey*, 530 U.S. 466, 478-481 (2000); *Wilson v. Arkansas*, 514 U.S. 927, 931 (1995); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 358-371 (1995) (Thomas, J., concurring). The notion is that the Bill of Rights, absent a clear textual indication to the contrary, should not be interpreted to prohibit common law practices accepted at the Framing. See *Atwater*, 532 U.S. at 345 n.14 ("courts must be 'reluctant . . . to conclude that the Fourth Amendment proscribes a practice that was accepted at the time of adoption of the Bill of Rights . . . .'") (quoting *Tennessee v. Garner*, 471 U.S. 1, 26 (1985) (O'Connor, J., dissenting)); *Mattox*, 156 U.S. at 243 ("Many of [the Constitution's] provisions in the nature of a bill of rights are subject to exceptions, recognized long before the adoption of the constitution, and not interfering at all with its spirit. Such exceptions were obviously intended to be respected."); see also *Robertson v. Baldwin*, 165 U.S. 275, 281 (1897) (same).

Consistent with this interpretive principle, *Crawford* held that "the 'right . . . to be confronted with the witnesses against him,' Amdt. 6, is most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding." 541 U.S. at 54. It follows, the Court observed, that an exception to the Confrontation Clause's prohibition of testimonial hearsay might be drawn for hearsay admissible at the time of the Founding. *Id.* at 56 & n.6 (noting the existence of a hearsay exception for dying declarations at common law, and leaving unresolved

whether, given that exception, the Sixth Amendment "incorporates an exception for testimonial dying declarations"). In dicta, the Court suggested that the only such hearsay exception was for dying declarations. *Id.* at 56 n.6 ("If this exception [for dying declarations] must be accepted on historical grounds, it is *sui generis*.").

Two footnotes later, however, *Crawford* noted the possibility that the common law also recognized a hearsay exception for excited utterances. *Id.* at 58 n.8. (The Court used the term "spontaneous declarations," but that term is equivalent for present purposes to "excited utterances.") As demonstrated below, such an exception did exist at common law. For that reason, excited utterances of the type admissible at common law fall outside the prohibition set forth in *Crawford*, even assuming (incorrectly, see Section B, *infra*) that they are testimonial within the meaning of *Crawford*.

The excited utterance doctrine traces its provenance to *Thompson v. Trevanion*, Skin. 402, 90 Eng. Rep. 179 (K.B. 1694), where Lord Chief Justice Holt held "that what the wife said immediate[ly] upon the hurt received, and before that she had time to devise or contrive any thing for her advantage, might be given into evidence" as "evidence of wounding." See 3 John Henry Wigmore, *A Treatise on the System of Evidence in Trials at Common Law*, § 1746, at 2250 (1904) (hereniafter, "Wigmore (1904)") (citing *Thompson* as first case to recognize the doctrine); *Crawford*, 541 U.S. at 58 n.8; *White*, 502 U.S. at 356 n.8.

Although apparently not cited in any reported decisions before the Framing, *Thompson* appeared in cases and treatises shortly after the Founding. In *Aveson v. Kinnaird*, 6 East 188, 102 Eng. Rep. 1258 (1805), Lord Ellenborough, citing *Thompson* with approval, held that if a wife "declared at the time that she fled from immediate terror of personal violence from the husband," her out-of-court statement would be

admissible. *Id.* at 193-194, 102 Eng. Rep. at 1261; see also *Berkeley Peerage Case*, 4 Camp. 401, 408, 171 Eng. Rep. 128, 131 (1811) ("Hearsay evidence is always to be received with caution, and particularly that which may have arisen when men's minds were heated and biassed by an existing controversy upon the subject; but instead of laying down a rigid rule which may exclude *bona fide* declarations entitled to implicit credit, confide in the discretion of the Judge . . . .") (not citing *Thompson*).

Shortly thereafter, in "one of the most important evidence treatises of the nineteenth century," Richard D. Friedman and Bridget McCormack, *Dial-In Testimony*, 150 U. Pa. L. Rev. 1171, 1211 (2002), the author favorably cited both *Thompson* and *Aveson* as exceptions to the general rule against admitting hearsay. 1 S.M. Phillipps, *A Treatise on the Law of Evidence* 202-203 (1st Am. ed. 1816). The same treatise cited *Rex v. Brasier*, 1 East Pl. Cr. 444 (1779), for the proposition that "on an indictment for a rape, what the girl said recently after the fact, (so that is excluded a possibility of practising on her), has been held to be admissible in evidence, as part of the transaction." Phillipps, at 202. Less than a decade later, another treatise cited *Thompson* in explaining that

> where an immediate account is given, or complaint made, by an individual, of a personal injury committed against him, the fact of making the complaint immediately, and before it is likely that anything should have been contrived and devised for the private advantage of the party, is admissible in evidence; as upon an indictment for rape, or upon an action for trespass and assault committed on the wife.

1 Thomas Starkie, *A Practical Treatise on the Law of Evidence* 149 (1st ed. 1824) (also citing *Rex v. Clarke*, 2 Starkie 242 (1812), and *Brasier*). And while petitioner Davis cites Eustachius Strickland, *A Treatise on Evidence* 397 (1830), for

the proposition that "contemporaneous declarations 'respecting the motives or objects he had in view of doing' the act were admissible, but assertions 'made prior or subsequent to the doing the acts' were not," Davis Br. 24, the Strickland treatise, on the very same page, approvingly cites *Thompson* for the proposition that "what the wife had said immediately upon the hurt, and before she had time to devise or contrive anything for her own advantage, might be given in evidence."

In *Rex v. Foster*, 6 Car. & P. 325, 25 Eng. C.L.R. 421 (1834), where the defendant was tried for manslaughter for running over the victim with a cabriolet, a wagoner testified as to what the victim said shortly after the incident. The wagoner did not see the incident itself, but "immediately after on hearing the deceased groan, he went up to him and asked him what was the matter." *Ibid.* At that point, defense counsel objected, asserting "that what the deceased said in the absence of the prisoner, as to what had caused the accident, is not receivable in evidence." *Ibid.* In rejecting that argument, Justice Park, relying upon *Aveson*, admitted the testimony "to show what it was that had knocked the deceased down." *Ibid.* It bears mention that the reporter of the *Foster* case, in an annotation providing the precise citation to *Aveson* (6 East, 193), noted that *Aveson* had in turn relied upon Lord Chief Justice Holt's decision in *Thompson*. 6 Car. & P. at 325.

In *Commonwealth v. M'Pike*, 57 Mass. (3 Cush.) 181 (1849), another manslaughter case, the victim died three months after being stabbed by the defendant, her husband. Upon being stabbed, the victim ran from her apartment up the stairs to her neighbor's, knocked on the door, and was let in. *Id.* at 182. A third person, who had heard the victim scream, "went for a watchman," and returned to the neighbor's room, where the victim asked him for water and said that the defendant had stabbed her. *Ibid.* The trial court overruled the defendant's objection to the third person's testimony, and the Supreme

Judicial Court affirmed, reasoning that "[t]he declaration of a person, who is wounded and bleeding, that the defendant has stabbed her, made immediately after the occurrence, though with such an interval of time, as to allow her to go from her own room up stairs into another room, is admissible in evidence." *Id.* at 181; accord, *Commonwealth v. Hackett*, 84 Mass. (2 Allen) 136, 138-140 (1861).

This Court relied upon several of the foregoing precedents in *Insurance Co. v. Mosley*, 75 U.S. (8 Wall.) 397 (1869). As evidence that the insured died from accidental causes, the insured's wife testified that the insured "got up [from bed] and went down stairs for the purpose of going out back," that "she didn't know how long he was gone," and that "[w]hen he came back he said he had fallen down the back stairs and almost killed himself." *Id.* at 399. In addition, the insured's son testified that "'he saw his father lying with his head on the counter, and asked him what was the matter; he replied that he had fallen down the back stairs and hurt himself very badly.'" *Id.* at 404.

The insurer argued that the declarant's statements should not have been admitted "as evidence of his fall down the stairs." *Id.* at 402-403. This Court disagreed, holding that the statements "were made immediately, or very soon after the fall; the declarations to his son, before he returned to his bed-room; those to his wife, upon his reaching there." *Id.* at 404. To support its ruling, this Court summarized the holdings of, and approvingly cited, *Thompson*, *Aveson*, *Foster*, and *M'Pike*. *Id.* at 405-407. In particular, the court explained that "[i]t is not easy to distinguish this case and that of [*Rex*] *v. Foster*, in principle, from the case before us, as regards the point under consideration." *Id.* at 407. In conclusion, and perhaps to eliminate any doubt as to the basis of its holding, the Court observed that the declarant's statements could not have been admitted as dying declarations. *Id.* at 409.

Despite the foregoing, petitioners assert that the common law did not recognize a hearsay exception for excited utterances. Hammon Br. 23 ("it is clear that as of 1791 there was no doctrine allowing admissibility of otherwise inadmissible statements on the ground that they were spontaneous declarations or excited utterances"); Davis Br. 18-22. To establish their point, petitioners must overcome *Thompson*, which was decided in 1694 and reported in 1728, see 6 W.S. Holdsworth, *A History of the English Law* 553 (1924), and thus available to the Framers. Their various attempts to do so are without merit.

1. Petitioners observe that *Thompson* was a civil case, not a criminal case. Hammon Br. 24; Davis Br. 29. That is true, but irrelevant. *Foster* and *M'Pike*, both criminal cases, relied upon *Thompson* (the former derivatively through *Aveson*), which indicates that courts understood *Thompson* to state a general evidentiary principle applicable to civil and criminal cases alike. The point is confirmed by Phillipps and Starkie, who in their early nineteenth century works cited *Thompson* in the same breath as criminal cases like *Brasier* and *Clarke*. See Phillipps, at 202-203; 1 Starkie, at 149. Further confirmation comes from this Court's opinion in *Mosley*, which cited civil (*Thompson* and *Aveson*) and criminal (*Foster* and *M'Pike*) cases for the same generally applicable evidentiary principle. *Crawford* itself cites *Thompson* as relevant authority. 541 U.S. at 58 n.8.

2. Hammon observes that *Thompson* was reported in 1728, but was not cited by another published decision until 1805. Hammon Br. 24. This, too, is true, but irrelevant. That *Thompson* was not cited by another *reported* decision until 1805 does not mean that the precedent was unknown or ignored in English and Colonial courts, the vast majority of whose decisions were unreported. *Thompson* itself was reported (Skin.

402), and it is sheer speculation for petitioner to suggest that it went unnoticed prior to the Founding.

3. Petitioners contend that *Thompson* was too vague and cryptic to stand for much of anything, let alone the principle that excited utterances are admissible as an exception to the hearsay rule. Hammon Br. 24-25; Davis Br. 30. Justice Clifford made a materially identical argument in his dissent in *Insurance Co. v. Mosley*, where he asserted that *Thompson* and *Foster* "are so imperfectly reported that they can hardly be said to be reliable." 75 (8 Wall.) at 418 (Clifford, J., dissenting). That argument failed to persuade this Court in *Mosley*, which had no trouble citing both decisions, and is no more persuasive 136 years later.

4. Petitioners contend that *Thompson* and its progeny govern only those circumstances where the out-of-court statement follows instantaneously from, or occurs simultaneously with, the exciting event. Hammon Br. 25-27; Davis Br. 30-31. Again, Justice Clifford unsuccessfully advanced the same argument in *Mosley*, see 75 U.S. (8 Wall.) at 412-413 (Clifford, J., dissenting). This Court rejected that proposition in citing *Thompson* to support the admission of an excited utterance made at least several minutes following the startling event. See *id.* at 399, 404; accord, *M'Pike*, 57 Mass. (3 Cush.) at 181-182 (same). *Thompson*'s and *M'Pike*'s application of the excited utterance doctrine in non-instantaneous circumstances is consistent with the views of Phillipps, who a generation after the Founding employed the term "recently," in addition to "immediate[ly]," in describing the appropriate interval between the exciting event and the (admissible) hearsay that followed. Phillipps, at 202-203.

5. Petitioners contend that two pre-Framing cases, *Rex v. Brasier*, 1 Leach 199, 168 Eng. Rep. 202, 1 East Pl. Cr. 443 (K.B. 1779), and *Rex v. Radbourne*, 1 Leach 457 (1787), established a rule contrary to that set forth in *Thompson*, and

thus cast doubt upon whether *Thompson* reflected the law prior to the Framing. Hammon Br. 27-28; Davis Br. 20, 28. They are incorrect.

The defendant in *Brasier* was charged with assault upon a five year-old girl. 1 East Pl. Cr. at 443. The victim's mother and another woman testified that the victim, "immediately upon her coming home[,] told all the circumstances of the injury done to her, and described the prisoner, who was a soldier, as the person who had committed it." *Ibid.* After the defendant was convicted, the trial judge referred the matter "for the opinion of the judges." *Ibid.* Two of the judges (Gould and Willes) initially believed that the testimony was properly admitted, given their view that children under the age of seven could not be sworn. *Id.* at 444. The matter then was submitted to all of the judges, who (contrary to Gould's and Willes's initial view) "unanimously agreed that a child of any age, if she were capable of distinguishing between good and evil, might be examined on oath; and consequently that evidence of what she had said ought not to have been received." *Ibid.* Significantly, the report concludes by noting that "[i]t does not however appear to have been denied by any in the above case, that the fact of the child's having complained of the injury recently after it was received is confirmatory evidence." *Ibid.*

Thus, at bottom, *Brasier* set forth a rule concerning whether a child is competent to testify at trial, not whether her out-of-court statement was inadmissible hearsay. That is precisely how the early state cases interpreted the decision. See *State v. Whittier*, 21 Me. 341, 1842 WL 1198, *5 (1842); *State v. Morea*, 2 Ala. 275, 1841 WL 201, *3 (1841); *State v. Miller*, 1 Del. Case 512 (1814); see also 1 John E. B. Myers, *Evidence in Child Abuse and Neglect Cases* § 2.2, at 67 (1992) (citing *Brasier* as the first case to create a presumption of competency for child witnesses); Comment, *Li'l People, Little Justice: The Effect of the Witness Competency Standard in California on*

*Children in Sexual Abuse Cases*, 22 J. Juv. L. 113, 114 (2001-2002) (citing *Brasier* as a competency case). Equally significant, Phillipps and Starkie — in marked contrast to petitioners — interpreted *Brasier* as reflecting, rather than refuting, the principle earlier set forth in *Thompson*. See Phillipps, at 202 (citing *Brasier* for the proposition that "on an indictment for a rape, what the girl said recently after the fact, (so that is excluded a possibility of practising on her), has been held to be admissible in evidence, as part of the transaction"); 1 Starkie, at 161 (citing *Brasier* for the proposition that "where an immediate account is given, or complaint made, by an individual, of a personal injury committed against him, the fact of making the complaint immediately, and before it is likely that anything should have been contrived and devised for the private advantage of the party, is admissible in evidence; as upon an indictment for rape"). If *Brasier* meant what petitioners claim it means, then Phillipps and Starkie, both writing in the early nineteenth century, would not have read it the way they did.

Even putting aside what *Brasier* meant, those who drafted the Confrontation Clause would not have been aware of, and so could not have been influenced by, the case. *Brasier* is cited in three reporters. Volume 168 of the English Reports was not published until 1928. Volume 1 of East's Pleas of the Crown was not published until 1803. The first volume of Thomas Leach's Crown Cases was not published until May 1789, in London, "at the earliest." Thomas Y. Davies, *What Did the Framers Know, and When Did They Know It? Fictional Originalism in* Crawford v. Washington, 71 Brook. L. Rev. 105, 157 n.163 (2005).

Although May 1789 predated the Framing, Leach's volume was not published in time to have actually influenced the Framers. The First Congress approved the Bill of Rights for state ratification in September 1789. *Id.* at 159. However,

"[t]he legislative record shows that there was no alteration of the [Confrontation Clause's] text following the report of the committee of eleven on July 11, 1789, and the only change that committee made from the proposals Madison had offered on June 8 [was] the deletion of the redundant words 'accusers and' . . . ." *Ibid.* Given this, Leach's first volume likely did not reach our shores by the time the Clause was framed. *Id.* at 160 ("taking into account the time to ship (literally) that volume to America and distribute it to customers, it is questionable whether copies . . . were available to Americans at all when the Confrontation Clause was framed "); cf. *White*, 502 U.S. at 363 (Thomas, J., concurring) (in ascertaining the meaning of the Confrontation Clause, looking to what "the drafters of the Sixth Amendment intended").

Davis cites the other pre-Framing case, *Rex v. Radbourne*, as evidence that English courts at the time of the Framing refused to admit testimony of "accusations" made to police "fresh[ly]" after the crime. Davis Br. 20. But because *Radbourne*, like *Brasier*, was first published in Leach, it could not have come to the attention of the Framers before the Framing. In any event, *Radbourne* did not appear to involve an excited utterance and says nothing to suggest that one would have been inadmissible.

The victim in *Radbourne* was lying in her bed, her wounds already bandaged, when she made the inadmissible statements, and there is nothing in the transcript of proceedings to indicate that she was agitated when she spoke. The Proceedings of the Old Bailey, London 1674 to 1834, Henrietta Radbourne, t17870711-1, at 11-12 (July 11, 1787), <http://www.oldbaileyonline.org/html_units/1780s/t17870711-1.html> (last visited Jan. 12, 2006) (testimony that victim was in bed and that constable could not observe her wounds because they were "done up" before he arrived) (using citation convention described in Davis Br. 19 n.4). Moreover, because

the defendant was a servant accused of killing her mistress, she was charged with both murder and petty treason. *Id.* at 20. "Thus, evidence in the trial was subject to the explicit requirement in the treason statutes," not applicable under the Marian statutes, "that all evidence of treason be taken 'in the presence' of the accused." Davies, 71 Brook. L. Rev. at 165. Given this, it is no surprise that nineteenth century American cases that cited *Radbourne* did not do so for the proposition advanced here by Davis. See, *e.g.*, *Mattox*, 156 U.S. at 240 (for the proposition that "the testimony of a deceased witness cannot be used in a criminal prosecution"); *Hart v. State*, 15 Tex. App. 202, 1883 WL 8889, *15 (1883) (for the proposition that "[i]n England, testimony before the examining magistrate on a charge of felonious wounding was deemed admissible on the trial for murder, where the injured person had died of the wound").

Davis also cites *State v. Hill*, 20 S.C.L. 607, 1835 WL 1416, *2 (App. L. 1835), as establishing that "[d]eclarants' 'excitement' . . . in no way exempted their statements reporting crimes to governmental agents from confrontation restrictions." Davis Br. 22. "If anything," Davis contends, "such excitement was seen as heightening the need for cross-examination," quoting the court's reference to excitement's potential to "'color[]'" testimony. *Ibid.* In fact, the declaration in *Hill* took the form of a "deposition . . . made on the application for" an arrest warrant in formal proceedings before a magistrate. 1835 WL 1416, at *1. That is precisely the sort of "formal statement to government officers" governed by the Confrontation Clause. *Crawford*, 541 U.S. at 51. Moreover, the "excitement incident to the wrong done" to which *Hill* referred as a possible source of bias is not the agitation that accompanies an excited utterance. Rather, as context makes clear, the court referred to the emotion that the crime victim may feel long after the incident, expressing concern that the declarant's status as a victim may "color[]" his formal testimony before a magistrate. *Ibid.*

Davis further cites *Rex v. Wink*, 6 Car. & P. 397, 172 Eng. Rep. 1293 (1834), for the proposition that a constable could not be asked at trial to repeat a robbery victim's identification of the assailant when reporting the crime. Davis Br. 20. Davis buries *Wink* in a parenthetical, and for good reason. While holding that the constable could not *directly* testify as to the name told him by the victim, the court proceeded to rule that the constable could testify as to "whether, in consequence of the prosecutor mentioning a name to him, he went in search of any person and, if he did, who that person was," 6 Car. & P. at 398, 172 Eng. Rep. at 293 — which of course was functionally equivalent to allowing the constable to repeat the name the victim had given.

6. Finally, Davis relies on treatises and cases from after 1870 to support his view that excited utterances were inadmissible in criminal trials. Davis Br. 24-27. Even assuming that materials of that vintage are relevant here, the weight of case authority from that era took the view that excited utterances were admissible. See, *e.g.*, *People v. Del Vermo*, 192 N.Y. 470, 483-487, 85 N.E. 690, 695-696 (1908) (noting that exception was accepted in the majority of States); *State v. Morrison*, 64 Kan. 669, 68 P. 48, 51 (1902); *Croomes v. State*, 40 Tex. Crim. 672, 676-677, 51 S.W. 924, 925 (1899); *State v. Murphy*, 16 R.I. 528, 17 A. 998 (1889); *Dismukes v. State*, 83 Ala. 287, 3 So. 671, 673 (1888); *Irby v. State*, 25 Tex. App. 203, 213-214, 7 S.W. 705, 706 (1888); *People v. Callaghan*, 4 Utah 49, 6 P. 49, 54-55 (1886); *State v. Horan*, 32 Minn. 394, 20 N.W. 905 (1884); *Kirby v. Commonwealth*, 77 Va. 681, 1883 WL 6701, *5 (1883); *State v. Middleham*, 17 N.W. 446, 446 (Iowa 1883); *State v. Wagner*, 61 Me. 178, 1873 WL 3285, *10-*11 (1873); *Crookham v. State*, 5 W.Va. 510, 1871 WL 2786, at *3 (1871).

The weight of authority is even greater today. See *White*, 502 U.S. at 356 n.8 (excited utterance doctrine recognized under Fed. R. Evid. 803(2) and nearly four-fifths of the States).

This consensus, particularly given the long-standing vitality of the excited utterance exception and the "respect traditionally accorded the States in the establishment and implementation of their own criminal trial rules and procedures," *Chambers v. Mississippi*, 410 U.S. 284, 302-303 (1973), should not lightly be disturbed.

* * *

In sum, the hearsay exception for excited utterances, conceived in *Thompson*, existed at common law. Court decisions and treatises from the decades after the Framing, while of course unavailable to the Framers, provide persuasive evidence that the Framers' generation recognized the exception. See *Crawford*, 541 U.S. at 49-50 (citing cases through 1858 and treatises through 1872); cf. *Atwater*, 532 U.S. at 337-344; *Apprendi*, 530 U.S. at 501-512 (Thomas, J., concurring); *Utah v. Evans*, 536 U.S. 452, 503-506 (2002) (Thomas, J., concurring and dissenting); *Alden v. Maine*, 527 U.S. 706, 743-745 (1999); *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 801-804, 816-819, 823-827 (1995). For this reason, the Confrontation Clause does not govern excited utterances of the type admissible at common law.

### B. Excited Utterances, As Understood In The Modern Era, Are *Per Se* Nontestimonial And Thus Not Governed By *Crawford*.

In the early nineteenth century, the excited utterance doctrine was understood to be a subset of the *res gestae* doctrine. 2 McCormick on Evidence §268, at 195-196 (5th ed. 1999). The notion underlying *res gestae* was that certain types of hearsay statements were admissible because they were inextricably linked to action. "The *res gestae* doctrine focused not on the reflective faculties of the declarant, but on the strict contemporaneousness of the statement with the exciting event, so that the statement was essentially a continuation of the

event." Jone Tran, *Crying Wolf or an Excited Utterance? Allowing Reexcited Statements to Qualify Under the Excited Utterance Exception*, 52 Clev. St. L. Rev. 527, 541-42 (2004-05).

Shortly after the turn of the last century, Wigmore expressed a different understanding, explaining that "the basis for the spontaneous exclamation exception [was] not the contemporaneousness of the exclamation, but rather the nervous excitement produced by the exposure of the declarant to an exciting event." 2 McCormick, § 271, at 200. As Wigmore wrote: "The general principle is based on the experience that, under certain external circumstances of physical shock, a stress of nervous excitement may be produced which stills the reflective faculties and removes their control, so that the utterance which then occurs is a spontaneous and sincere response to the actual sensations and perceptions already produced by the external shock." 3 Wigmore (1904), §1747, at 2250. "The rationale for the exception lies in the special reliability that is furnished when excitement suspends the declarant's powers of reflection and fabrication." 2 McCormick, § 272, at 204.

Wigmore's recasting of the doctrine took hold and remains the prevailing rationale for the modern excited utterance doctrine. See Tran, 52 Clev. St. L. Rev. at 542 ("Wigmore's endorsement of deliberation over spontaneity ultimately superceded the *res gestae* doctrine as the lynchpin to the excited utterance exception."). Currently,

> all agree on two basic requirements. First, there must be an occurrence or event sufficiently startling to render inoperative the normal reflective thought processes of the observer. Second, the statement of the declarant must have been a spontaneous reaction to the occurrence or event and not the result of reflective thought. These two elements, which define the essence

> of the exception, together with a third requirement that the statement 'relate to' the event, . . . determine admissibility.

2 McCormick, §272, at 204. Although today's rationale for the doctrine differs from that prevailing at common law, the actual contours of the exception have changed little:

> Its phrasings differ widely in different courts; but there is in the judicial opinion of today something of an approach to uniformity. In essence, the language of Lord Holt, in *Thompson v. Trevanion*, still serves to indicate clearly and concisely the principle of the exception.

6 Wigmore, *Evidence* § 1747, at 196 (Chadbourn rev. 1976).

In their modern form, excited utterances are fundamentally incompatible with the conception of a "testimonial" declaration under *Crawford*. This emphatically is *not* because excited utterances are reliable or trustworthy. See *Crawford*, 541 U.S. at 60-65 (rejecting reliability and trustworthiness as the touchstone of Confrontation Clause analysis). Rather, it is because the agitated, unthinking state that makes an excited utterance reliable for hearsay purposes *also* makes it nontestimonial for Confrontation Clause purposes. Although *Crawford* "broke the linkage" between the Confrontation Clause and the "inquiry whether the testimony was eligible for admission under an accepted hearsay exception," the qualities that make a hearsay statement an excited utterance may still "bear on whether a statement is testimonial or not." *Arnold*, 410 F.3d at 912 (Sutton, J., dissenting).

The Confrontation Clause "applies to 'witnesses' against the accused — in other words, those who 'bear testimony.'" *Crawford*, 541 U.S. at 51 (citation omitted). A statement is testimonial if it is a "solemn declaration or affirmation made for

the purpose of establishing or proving some fact." *Ibid.* (internal quotations omitted). "An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not." *Ibid.* "The constitutional text, like the history underlying the common-law right of confrontation, thus reflects an especially acute concern with a specific type of out-of-court statement." *Ibid.*

The agitated declarant who makes an excited utterance is far afield from the formal accusers and solemn witnesses that concern the Confrontation Clause. Declarants in a state of "physical shock [or the] stress of nervous excitement," whose "reflective faculties" have been stilled, 3 Wigmore (1904) §1747, at 2250, are incapable of rendering solemn or formal statements. As Judge Sutton observed,

> It is very difficult to imagine a 'solemn' excited utterance or even a semi-solemn excited utterance. Any statement that takes on the qualities that the Court has ascribed to the definition of testimonial evidence (a 'solemn declaration . . . ' *Crawford*, 541 U.S. at 51) or to agreed-upon forms of testimonial evidence ('affidavits, depositions, prior testimony, or confessions,' *id.* at 51-52) would seem to depart from the prerequisites for establishing an excited utterance. To respect the one set of requirements would seem to disrespect the other.

*Arnold*, 410 F.3d at 914 (Sutton, J., dissenting); see also *id.* at 912 (Sutton, J., dissenting) ("Surely a victim's fear-induced statement to a 911 dispatcher that he is being chased through the house by an assailant is nothing more than a fervent cry for help, not a 'solemn declaration or affirmation made for the purpose of establishing or proving some fact' in a court of law.") (quoting *Crawford*, 541 U.S. at 51).

Both state supreme courts below examined the declarant's perspective in determining whether her statement was testimonial. Hammon J.A. 100-104; Davis J.A. 125-128. In challenging the courts' judgments, petitioners agree that analysis under *Crawford* should focus on the declarant's perspective. Hammon Br. 7, 14, 17-20; Davis Br. 13, 41-42; see also ACLU Br. 16 ("The testimonial nature of the statement should be tested by reference to how a reasonable person would expect the statement to be used."). For himself, Hammon contends that the inquiry should be whether the declarant "*knowingly created evidence* that a reasonable person understands will likely be used by the criminal justice system," and argues that "[t]he jurisprudence of the Confrontation Clause should recognize that such *self-conscious creation of evidence* is testimonial . . . ." Hammon Br. 18 (emphasis added).

Petitioners' approach is open to serious question for the reasons ably advanced by respondents Indiana and Washington. The point here is not to enter the debate, but merely to observe that petitioners' view, if adopted by this Court, would serve only to *strengthen* the proposition that excited utterances are *per se* nontestimonial. A declarant under the stress of nervous excitement, such that her normal reflective processes are rendered inoperative, is in no position to "self-conscious[ly]" do anything, let alone "creat[e] . . . evidence" that she "understands" will likely be used in a future prosecution. The reason is plain: "When the declarant's emotional state is such that it would satisfy the spontaneous utterance exception, the declarant does not (and reasonably would not) entertain any expectations about whether his or her statement will be used at a possible future trial — the whole premise of spontaneous utterances is that the witness is not capable of such reasoning at the time he or she is speaking." *Commonwealth v. Gonsalves*, 445 Mass. 1, 34, 833 N.E.2d 549, 572 (2005) (Sosman, J., concurring in part); accord, *State v. Ohlson*, 125 P.3d 990, 995 (Wash. App. 2005) ("It is not reasonable to regard an excited

utterance as 'bearing witness' such that the declarant would know that it would be used in a later prosecution.").

In sum, excited utterances, as understood under modern doctrine, are *per se* nontestimonial. For that reason — and regardless of whether (and, if so, to what extent) excited utterances were recognized as a hearsay exception prior to the Framing — they are exempt from scrutiny under *Crawford*. See 541 U.S. at 68 ("[w]here nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law").

## CONCLUSION

The judgments of the Indiana Supreme Court and the Supreme Court of Washington should be affirmed.

Respectfully submitted.

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IN THE

# Supreme Court of the United States

ADRIAN MARTELL DAVIS,

*Petitioner*,

*v.*

WASHINGTON,

*Respondent*.

HERSHEL HAMMON,

*Petitioner*,

*v.*

INDIANA,

*Respondent*.

ON WRITS OF CERTIORARI TO THE
SUPREME COURTS OF WASHINGTON AND INDIANA

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## TABLE OF CONTENTS


| | Page |
|---|---|
| TABLE OF CITED AUTHORITIES | ii |
| INTEREST OF *AMICUS CURIAE* | 1 |
| SUMMARY OF THE ARGUMENT | 2 |
| ARGUMENT | 5 |
| I. Millions Of Child Victims Are Silenced By Abuse And By Procedures Designed To Protect Them. | 5 |
| A. Child Maltreatment Is Pervasive. | 5 |
| B. Child Victims Are Silenced by Their Abusers and Few Cases Are Prosecuted. | 6 |
| C. Child Abuse Cases Are Notoriously Difficult To Prosecute. | 9 |
| II. Child Maltreatment Cases Illustrate That Petitioners' Proposed Standard For Defining "Testimonial" Statements Is Inherently Flawed. | 11 |
| A. Child Maltreatment Cases Illustrate That the "Reasonable Person" Standard Is Unworkable | 12 |
| B. Petitioners' Test Is Overbroad Because It Could Potentially Define as "Testimonial" Reports of Abuse by Children to Family Members. | 17 |
| C. Petitioners' Test Is Inconsistent with Admission of Children's Out-of-Court Statements Reporting Child Sexual Abuse in 18th Century Trials. | 19 |
| CONCLUSION | 24 |

## TABLE OF CITED AUTHORITIES

*Page*

**CASES**

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527 U.S. 116 (1999) ..... 3, 13

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458 U.S. 747 (1982) ..... 15

*Pennsylvania v. Ritchie*,
480 U.S. 39 (1987) ..... 7

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321 U.S. 158 (1944) ..... 15

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502 U.S. 346 (1992) ..... 12

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2006 WL 176839 (Tex. App. Jan. 26, 2006) .... 14

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111 P. 3d 28 (Haw. 2005) ..... 14

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Br. Amicus Curiae of the ACLU and the ACLU of Va. in Support of Petr., *Lilly v. Virginia*, 527 U.S. 116 (1999) ..... 3, 13

## INTEREST OF *AMICUS CURIAE*[1]

The National Association of Counsel for Children (NACC) is a non-profit child advocacy and professional organization founded in 1977. The NACC has approximately 2,000 members from all fifty states, including attorneys who represent children before family and juvenile courts, physicians, psychologists, social workers, law professors, and other professionals concerned with the protection of children. The NACC's mission is to improve the lives of children and families through legal advocacy. The NACC provides training and technical assistance to attorneys and other professionals, serves as a public information and professional referral center, and educates public officials about the needs of children.

Amicus submits this brief out of concern that Petitioners' proposed standard for defining "testimonial" statements under the Confrontation Clause is overbroad and unworkable and would further impede the States' ability to prosecute child abusers and protect the welfare of our children.[2]

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1. No counsel for a party authored this brief in whole or in part. No person or entity other than the NACC, its members and counsel made a monetary contribution to the preparation or submission of this brief. Both Petitioners and Respondents have consented to the filing of this brief, and pursuant to Rule 37.3(a), the NACC has filed the letters of consent with the Clerk of the Court.

2. Amicus curiae acknowledge the assistance of Thomas D. Lyon, J.D., Ph.D., Professor of Law, University of Southern California and Raymond LaMagna, University of Southern California Law School Class of 2006, in the preparation of this brief. Amicus also acknowledge the assistance of Jacob E. Smiles, an Arnold & Porter LLP associate who is admitted to practice only in Maryland and is practicing law in D.C. pending approval of his application for admission to the D.C. Bar and under the supervision of principals of the firm who are members in good standing of the D.C. Bar.

## SUMMARY OF THE ARGUMENT

Child sexual abuse and other forms of child maltreatment are pervasive, yet most victims suffer in silence. Children's secrecy is maintained by their closeness to their perpetrators, by threats and inducements, and by violence in the home. Reporting is rare, and prosecution rarer still. Prosecutions are hobbled by child witnesses' vulnerabilities and by jurors' skepticism. States have responded by adopting statutes allowing children's out-of-court statements to be introduced at trial.

How this Court interprets its holding in *Crawford* in the present cases is likely to affect the continued viability of these statutes in prosecutions where an abused child is unable to testify. Although children's statements are not at issue here, Petitioners' proposed standard for defining "testimonial" statements should be considered in light of its implications for thousands of child maltreatment prosecutions.

Petitioners' standard—which asks whether a "reasonable person" would anticipate use of the statement for law enforcement purposes—is inherently flawed. Nowhere is this more evident than when the test is applied to cases of child sexual abuse.

First, a "reasonable person" standard is overbroad because it has the capacity to include as "testimonial" statements that declarants never anticipated would be used prosecutorially. For instance, a young child reporting sexual abuse may not appreciate that a statement could be used at trial, when a "reasonable person" would.

Some courts, attempting to preserve the objective nature of the test without embracing its inflexibility, have suggested that the reasonable person may be a "reasonable child." Others

have shifted to a subjective test when considering children's statements. Indeed, the leading scholarly proponents of Petitioners' standard have suggested that a subjective test for certain children declarants may be appropriate. *See* Richard D. Friedman, *Grappling With the Meaning of "Testimonial,"* 71 Brook. L. Rev. 241, 272-73 (2005); *see also* Richard D. Friedman, *The Conundrum of Children, Confrontation, and Hearsay*, 65 Law & Contemp. Probs. 243, 249-52 (2002).[3]

All variations of the test are unworkable. An inflexible objective test all but begs for exceptions for certain classes of declarants (*e.g.*, children, the mentally retarded). An age-based objective test would compel courts to make developmental assessments of children's understanding of "investigation," "prosecution," and "crime." A "reasonable child" test or subjective test would permit consideration of an actual or hypothetical child's abilities, experience, and contextual understanding. But these approaches would require courts to do exactly what Petitioner Hammon says they should not: "flail about in the dark in an attempt to understand the psyche of a speaker who is not even testifying in court." (Hammon Pet. Br. 18.)

Second, Petitioners' proposed test is overbroad because it could encompass statements made to non-governmental officials. (*Id.* at 17 ("[F]or a statement to be deemed testimonial, it is not essential that it be received by a government officer.")). Again, child abuse cases illustrate the complexities and flaws with such an approach.

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3. *See also* Brief Amicus Curiae of Law Professors Sherman J. Clark, James J. Duane, Richard D. Friedman, Norman Garland, Gary M. Maveal, Bridget McCormack, David A. Moran, Christopher B. Mueller, and Roger C. Park, in Support of Petitioner, *Crawford v. Washington*, 541 U.S. 36 (2004) (No. 02-9410), 2003 WL 21754958, at *22 n.12; Brief Amicus Curiae of the ACLU and the ACLU of Virginia, in Support of Petitioner, *Lilly v. Virginia*, 527 U.S. 116 (1999) (No. 98-5881), 1998 WL 901782, at *26 & n.44.

Children typically disclose abuse (if ever) to a trusted adult. Adult recipients of the information tend not to report, even in instances when they are legally mandated to do so. Nevertheless, Petitioners would have courts attempt to determine whether a "reasonable person" would expect the recipient to report abuse.

Such an approach is as historically unsound as it is unworkable. Child sexual abuse cases from the time of the Framing establish that children's out-of-court reports were routinely admitted into evidence, even if the child failed to testify at trial.

In sum, Petitioners' overbroad test would further silence child victims. Currently, less than 10% of all child sexual abuse comes to the attention of authorities, and still fewer are ever prosecuted. Additional obstacles that are not grounded in the text or history of the Confrontation Clause should be rejected.

## ARGUMENT

### I. MILLIONS OF CHILD VICTIMS ARE SILENCED BY ABUSE AND BY PROCEDURES DESIGNED TO PROTECT THEM.

#### A. Child Maltreatment Is Pervasive.

Child maltreatment[4] is pervasive and exploits the most vulnerable victims. Child sexual abuse, defined as sexual contact between an adult and a child, has been reported by 20% of women and 5 to 10% of men in the United States and other nations. Jennifer J. Freyd et al., *The Science of Child Sexual Abuse*, 308 Sci. 501 (2005). Based on the population of children in the United States, this means that more than 500,000 children fall victim to abuse every year. *See* Terry Lugaila & Julia Overturf, United States Census Bureau, *Children and the Households They Live In: 2000* (2004). These are conservative estimates, given the likelihood of underreporting and memory failure. Freyd, *supra*, at 501.

Child physical abuse is even more common than sexual abuse. David Finkelhor & Jennifer Dziuba-Leatheman, *Victimizaton of Children*, 49 Am. Psychologist 173, 175 (1994). Moreover, child maltreatment overlaps with domestic violence. Children are disproportionately present in homes to which police are called for domestic violence crimes.

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4. Child maltreatment includes physical child abuse, sexual child abuse, and child neglect. Child neglect includes a failure to provide for the child's needs or a failure to protect, and may include exposure to domestic violence. Douglas Barnett et al., *Defining Child Maltreatment: The Interface Between Policy and Research*, *in Advances in Applied Developmental Psychology: Child Abuse, Child Development and Social Policy*, at 7 (Dante Cicchetti & Sheree L. Toth eds.). This brief emphasizes child sexual abuse because it is among the most commonly prosecuted crimes against children.

John W. Fantuzzo, et al., *Domestic Violence and Children: Prevalence and Risk in Five Major U.S. Cities*, 36 J. Am. Acad. Child & Adolescent Psychiatry 116, 120 (1997). Approximately 40% of children in maritally violent homes are themselves physically abused. Anne E. Appel & George W. Holden, *The Co-Occurrence of Spouse and Physical Child Abuse: A Review and Appraisal*, 12 J. Fam. Psychol. 578, 583 (1998) (review of 31 studies). Beyond that, children exposed to domestic violence suffer from ill-effects akin to physically abused children. Katherine M. Kitzmann et al., *Child Witnesses to Domestic Violence: A Meta-Analytic Review*, 71 J. Consulting & Clinical Psychol. 339, 345-46 (2003) (meta-analysis of 118 studies).

### B. Child Victims Are Silenced by Their Abusers and Few Cases Are Prosecuted.

Only about 10% of child sexual abuse is ever reported to the authorities (either police or social services). Freyd, *supra*, at 501. Indeed, most victims of child sexual abuse fail to disclose abuse to anyone until they reach adulthood. A nationally representative survey of 3,423 American men and women found that 78% of those disclosing sexual abuse to the surveyor failed to disclose abuse during their childhood. Edward O. Laumann et al., *The Social Organization of Sexuality: Sexual Practices in the United States* (1994). Delays of more than ten years have been reported by a majority of respondents in other nationally representative surveys. *See* Jessie Anderson et al., *Childhood Sexual Abuse Experiences in a Community Sample of Women*, 32 Am. Acad. Child & Adolescent Psychiatry 911, 915 (1993) (of 3000 New Zealand women surveyed, 52% failed to disclose abuse during childhood); *accord* Jillian M. Fleming, *Prevalence of Childhood Sexual Abuse in a Community Sample of Australian Women*, 166 Med. J. of Austl. 65, 67 (1997). And over a quarter of respondents in other national

surveys never told *anyone* they were abused until the survey, "not mothers, best friends, or husbands." Daniel W. Smith et al., *Delay in Disclosure of Childhood Rape: Results from a National Survey*, 24 Child Abuse & Neglect 273, 283 (2000).

One reason that children so frequently fail to disclose abuse is that most sexual abuse is perpetrated by adults who are close to the child. Most childhood rapes are by relatives, friends, and known acquaintances. In one nationally representative survey, only 10% of childhood rapes were by strangers. Smith, *supra*, at 278. Sexual abusers typically exploit a trusting relationship, either one that is born of family relationships and living arrangements, or one they create through their encounters with the child and his or her family. Michele Elliott et al., *Child Sexual Abuse Prevention: What Offenders Tell Us*, 19 Child Abuse & Neglect 579, 585 (1995).

It stands to reason that the closer the relationship between the child and the perpetrator, the greater the chance that abuse will not be disclosed, or that disclosure will be delayed. As the Court has recognized, "a child's feelings of vulnerability and guilt and his or her unwillingness to come forward are particularly acute when the abuser is a parent." *Pennsylvania v. Ritchie*, 480 U.S. 39, 60 (1987).

Children also fail to disclose because the abusers often threaten to harm them or their loved ones. In one nationwide survey of 954 criminal cases of childhood sexual abuse, children were threatened in over a fourth of the cases:

> [W]arnings ranged from pleas that the abuser would get into trouble if the child told (or that the abuser would be sent away and the child would never see them again—a powerful message to a

> young child whose abuser is also a "beloved" parent), to threats that the child would be blamed for the abuse (especially troubling were children who were told that the defendant's intimate—the child's mother—would blame the child for "having sex" with the defendant and would thus turn against him or her), to ominous warnings that the defendant would hurt or kill the child (or someone he or she loved) if they revealed the abuse.

Barbara Smith & Sharon G. Elstein, *The Prosecution of Child Sexual and Physical Abuse Cases: Final Report* 93, 122 (1993).[5]

When victims do come forward, their first disclosure is usually to a family member or friend, and virtually never to authorities. Moreover, most disclosures to private parties are never brought to the attention of authorities. Smith, *supra*, at 279 (6.6% of childhood rape victims first told police/social worker/clergy; only 12% *ever* reported to authorities). Abusers closer to the child are least likely to be pursued, given the child's and family's reluctance to proceed. Rochelle F. Hanson et al., *Factors Related to the Reporting of Childhood Rape*, 23 Child Abuse & Neglect 559, 560 (1999) (rapes by strangers more likely to be reported to authorities than rapes by perpetrators the child knew). Often, the child's

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5. A study examining over 500 cases of child sexual abuse prosecuted in Canada had similar findings, noting that threats were more common among children who delayed disclosure, threats were reported by about half of the children, and that "overt threats were not necessary if the man had a history of violence within the home." Louise D. Sas & Alison H. Cunningham, *Tipping the Balance to Tell the Secret: Public Discovery of Child Sexual Abuse* 1, 91-92, 122 (1995) (reporting threats to hurt the child or a third-party, harm the mother emotionally, withdraw privileges, and warnings that the abuser would be harmed by the disclosure or that the child would no longer be loved by his or her mother).

mother is herself the victim of domestic violence and unwilling to notify authorities. Appel & Holden, *supra*, at 582 (sexual abuse higher in homes with domestic violence).

As a result of non-disclosure, child sexual abuse is among the least prosecuted serious crimes. Further, even when the abuse is disclosed, various factors discourage prosecution. In large part because of the vulnerabilities of the victims—their age, their reluctance to testify, and the reluctance of their family members to pursue charges—most sexual abuse cases substantiated by social services are not prosecuted. Patricia G. Tjaden & Nancy Thoennes, *Predictors of Legal Intervention in Child Maltreatment Cases*, 16 Child Abuse & Neglect 807, 816-18 (1992) (19% of substantiated sexual abuse cases prosecuted). Even among cases presented for prosecution by the police, as many as half were rejected. *See* Theodore P. Cross et al., *Prosecution of Child Abuse: A Meta-Analysis of Rates of Criminal Justice Decisions*, 4 Trauma, Violence, & Abuse 323, 330 (2003).

### C. Child Abuse Cases Are Notoriously Difficult To Prosecute.

As the Court has recognized, "[c]hild abuse is one of the most difficult crimes to detect and prosecute, in large part because there often are no witnesses except the victim." *Ritchie*, 480 U.S. at 60. This has long been the case. Matthew Hale, *The History of the Pleas of the Crown* 634 (T. Payne et al., 1778) ("The nature of the offense, which is most times secret, and no other testimony can be had of the very doing of the fact, but the party upon whom it is committed.").

Prosecutors face a number of hurdles when presenting child witnesses. Children who understand the importance of telling the truth may nevertheless fail to qualify to take the oath because of the way in which competency questions are

phrased. Thomas D. Lyon & Karen J. Saywitz, *Young Maltreated Children's Competency to Take the Oath*, 3 Applied Developmental Sci. 16, 1617 (1999); Thomas D. Lyon, et al., *Redu ing Maltreated Children's Reluctance To Answer Hypothetical Oath-Taking Competency Questions*, 25 Law & Hum. Behav. 81, 8182 (2001). Children who testify truthfully are susceptible to error because of the intimidating nature of the courtroom or because of the aggressiveness of cross-examination. Karen J. Saywitz & Rebecca Nathanson, *Children's Testimony and their Perceptions of Stress In and Out of the Courtoom*, 17 Child Abuse & Neglect 613, 619-20 (1993) (children less accurate when questioned in courtroom environment); Rachel Zajac & Harlene Hayne, *I Don't Think That's What Really Happened: The Effect of Cross-Examination on the Accuracy of Children's Reports*, 9 J. Experimental Psychol. Applied 187, 193 (2003) (children less accurate when cross-examiner challenges their testimony). Protective devices designed to reduce children's trauma are also likely to reduce their credibility in the eyes of the jury, who expect to see live witnesses. *See, e.g.*, Gail S. Goodman, et al., *Face-to-Face Confrontation: Effects of Closed-Circuit Technology on Children's Eyewitness Testimony and Jurors' Decisions*, 22 Law & Hum. Behav. 165 (1998) (closed-circuit testimony increased children's accuracy but reduced jurors' perceptions of children's credibility).

Sexual abuse cases also present unique difficulties because of jurors' unrealistic expectations. Jurors expect medical evidence of sexual abuse, yet there usually is none. Susan Morison & Edith Greene, *Juror and Expert Knowledge of Child Sexual Abuse*, 16 Child Abuse & Neglect, 595, 607-08 (1992); Astrid Heger et al., *Children Referred For Possible Sexual Abuse: Medical Findings In 2384 Children*, 26 Child Abuse & Neglect 645, 652 (2002). Jurors expect children to exhibit strong emotional reactions when describing abuse,

yet children usually do not. Pamela C. Regan & Sheri J. Baker, *The Impact of Child Witness Demeanor on Perceived Credibility and Trial Outcome in Sexual Abuse Cases*, 13 J. Fam. Violence 187 (1998); Barbara Wood et al., *Semistructured Child Sexual Abuse Interviews: Interview And Child Characteristics Related to Credibility of Disclosure*, 20 Child Abuse & Neglect 81, 88 (1996). Moreover, jurors, particularly males, hesitate to convict if they believe that the child consented to the abuse, even if the "consenting" child is as young as eleven years old. Peter K. Isquith et al., *Blaming The Child: Attribution Of Responsibility To Victims Of Child Sexual Abuse, in Child Victims, Child Witnesses: Understanding & Improving Testimony* 203, 223 (G.S. Goodman & B. L. Bottoms eds., 1993).

Notwithstanding these hurdles, prosecutors still strive to produce a live witness in court, knowing that jurors likely will give hearsay evidence less credence. *See* John E.B. Myers et al., *Jurors' Perceptions of Hearsay In Child Sexual Abuse Cases*, 5 Psychol. Pub. Pol'y & L. 388 (1999) (hearsay evidence is generally used to supplement a child's testimony, not in its place). Nevertheless, prosecutors may be forced in some cases to rely upon the child's out-of-court statements where the child fails to qualify to take the oath, is too frightened to testify, or is kept away from trial.

## II. CHILD MALTREATMENT CASES ILLUSTRATE THAT PETITIONERS' PROPOSED STANDARD FOR DEFINING "TESTIMONIAL" STATEMENTS IS INHERENTLY FLAWED.

Petitioners urge the Court to adopt a "simple" standard to define when a statement is "testimonial" for Confrontation Clause purposes: "whether a reasonable person in the position of the declarant would anticipate use of the statement in investigation or prosecution of a crime" (Hammon Pet. Br. 7), or whether "a reasonable declarant would have anticipated

that her statement might be used for law enforcement purposes." (Davis Pet. Br. 41.)[6]

As a threshold matter, Petitioners cite no historical support for the standard. Likewise, they provide no textual support. A defendant has a right to confront "witnesses," not "witnesses who reasonably would anticipate" that their statements may be used in the prosecution of a crime. Further, members of the Court have noted the practical difficulties with such a test:

> Attempts to draw a line between statements made in contemplation of legal proceedings and those not so made would entangle the courts in a multitude of difficulties. Few types of statements could be categorically characterized as within or without the reach of a defendant's confrontation rights.

*White v. Illinois*, 502 U.S. 346, 364 (1992) (Thomas, J., joined by Scalia, J., concurring in part and concurring in the judgment). Child maltreatment cases aptly illustrate these deficiencies.

### A. Child Maltreatment Cases Illustrate That the "Reasonable Person" Standard Is Unworkable

The "reasonable person" test is overbroad because it will include as "testimonial" statements the declarant never anticipated would be used at trial.

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6. Though his position is not entirely clear, Hammon suggests that this test presumptively is met whenever a declarant makes a "statement . . . to a known police officer (or other government agent with significant law enforcement responsibilities) and accusing another person of a crime. . . ." (Hammon Pet. Br. 7.)

Even the leading proponents of the "reasonable person" test repeatedly have acknowledged that it may be ill-suited when the declarant is a young child abuse victim. *See* Friedman, *Grappling*, *supra*, at 272-73; *see also* Friedman, *Conundrum*, *supra*, at 249-52.[7] As Professor Friedman has explained:

> Suppose a child is so young that she has no sense that what she is reporting is wrongful conduct . . . and no sense that the person she identifies as the perpetrator is subject to punishment for it. Consider, for example, these two cases:
>
> 1. Webb: An eighteen-month-old girl, on being lowered into the bath, said, "Ow bum," and then after the bath, while her mother was examining her, "Ow bum daddy."
>
> 2. Rhea: A two-and-one-half year-old child was interviewed by a child protection specialist of the

7. *See also* Brief Amicus Curiae of Law Professors Sherman J. Clark, James J. Duane, Richard D. Friedman, Norman Garland, Gary M. Maveal, Bridget McCormack, David A. Moran, Christopher B. Mueller, and Roger C. Park, in Support of Petitioner, *Crawford v. Washington*, *supra*, 2003 WL 21754958, at *22 n.12 ("Amici candidly acknowledge that statements by young children will present some of the closest issues under the testimonial approach, just as they do in the current framework. Pre-trial statements by children to care-givers such as parents and physicians may be considered non-testimonial in some circumstances even though statements by adults in similar circumstances would likely be considered testimonial."); Brief Amicus Curiae of the ACLU and the ACLU of Virginia, in Support of Petitioner, *Lilly v. Virginia*, *supra*, at *26 & n.44 ("Statements made by children often pose difficult issues. . . . Professor Friedman would consider other factors with respect to children. For example, a very young child might have so little understanding that she should not be deemed a witness for Confrontation Clause purposes.").

> Department of Human Resources. In response to questions, she denied that her father had done anything wrong to her, but she nodded in agreement to the question, "Did daddy make you put his tee-tee in your mouth?"
>
> It seems dubious to say that the children in these cases were acting as witnesses.

Friedman, *Conundrum*, *supra*, at 250 (footnotes omitted).

Courts, too, have recognized the tendency of the "reasonable person" test to sweep in statements that the declarant might not anticipate being used at trial. *See Maryland v. Snowden*, 867 A.2d 314, 328-29 (Md. 2005) ("Although . . . there may be situations where a child may be so young or immature that he or she would be unable to understand the testimonial nature of his or her statements, we are unwilling to conclude that, as a matter of law, young children's statements cannot possess the same testimonial nature as those of other, more clearly competent declarants."). Yet, some courts have adopted the test nonetheless. *See id.* at 328; *Hawaii v. Grace*, 111 P.3d 28, 38 (Haw. 2005); *Rangel v. Texas*, __ S.W.3d __, No. 2-04-514-CR, 2006 WL 176839, at *5 & n.1 (Tex. App. Jan. 26, 2006).

Other courts have sought to remedy the shortcomings of a rigid reasonable person test by looking not to a "reasonable person," but rather, a reasonable person in the position of the declarant. Last week, for instance, the Colorado Supreme Court reinstated a conviction reversed by the intermediate appellate court, in part by finding that "an objectively reasonable person in the [seven-year-old] declarant's position would not have believed his statements to the doctor would be available for use at a later trial," where a police officer went with the child to the hospital and asked the doctor to

perform a forensic examination. *Colorado v. Vigil*, __ P.3d __, No. 04SC532, 2006 WL 156987, at *7 (Colo. Jan. 23, 2006).

Similarly, other courts address the over-inclusiveness of the test by turning the "reasonable person" standard into a subjective test which examines the perspective of the actual declarant. *See, e.g., Minnesota v. Scacchetti*, 690 N.W.2d 393, 396 (Minn. Ct. App. 2005) (statement to doctor non-testimonial because defendant failed to show that "the circumstances surrounding the contested statements led the 3-year-old to reasonably believe her disclosures would be available for use at a later trial, or that the circumstances would lead a reasonable child of her age to have that expectation."), *review granted* (Minn. Mar. 29, 2005). Indeed, the leading proponents of the test have suggested a variation of a subjective test in cases involving certain children may be appropriate. *See* Friedman, *Grappling*, *supra*, at 272-73.[8]

Though the "reasonable person in the position of declarant" or "subjective test" at least attempt to determine the understanding of a real or hypothetical declarant, these formulations would require courts to delve into the age and

8. It also has been suggested that certain children should potentially be relieved outright from the obligation of being "witnesses" for Confrontation Clause purposes. *See* Friedman, *Grappling*, *supra*, at 272; *accord* Sherman J. Clark, *An Accuser-Obligation Approach to the Confrontation Clause*, 81 NEB. L. REV. 1258 (2003). To be sure, child abuse cases present unique circumstances that may warrant such accommodations. *See generally Maryland v. Craig*, 497 U.S. 836, 849 (1990); *New York v. Ferber*, 458 U.S. 747, 757 (1982); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982); *Prince v. Massachusetts*, 321 U.S. 158, 168 (1944). The reasonable person test, however, is not flawed only when the declarant is a child. Child abuse cases simply provide an apt illustration of the inherent problems of any test that requires an assessment of the mental state of a (real or hypothetical) declarant.

developmental stages of children concerning their potential understanding of the abuse and sophisticated concepts such as prosecution and punishment. *See* Chris Hutton, *Sir Walter Raleigh Revived: The Supreme Court Re-Vamps Two Decades of Confrontation Clause Precedent in* Crawford v. Washington, 50 S.D. L. Rev. 41, 57-61 (2005) (providing hypotheticals and differing outcomes based on age groups). For instance, children as young as two years old are capable of providing truthful information in response to nonleading questions about distressing events. Carole Peterson, *Children's Memory for Medical Emergencies: 2 Years Later*, 35 Developmental Psych. 1493 (1999). Moreover, toddlers may have some understanding that inflicting injury is immoral and leads to punishment. Judith G. Smetana & Judith L. Braeges, *The Development of Toddler's Moral and Conventional Judgments*, 36 Merrill-Palmer Quarterly 329 (1990). At the same time, children will appear not to understand the meaning and morality of the oath until they are five years or older. Lyon & Saywitz, *supra*. Still older children will lack understanding of court processes that might be integral to an awareness of the legal significance of one's statements. *See* Allie Phillips, *Child Forensic Interviews After* Crawford v. Washington: *Testimonial or Not?*, 39 Prosecutor 17, 21-27 (Aug. 2005) (discussing studies). Hence, one could conclude that children at a particular age are both capable and incapable of making "testimonial" statements, depending on how narrowly or broadly one defines "investigation," "prosecution," and "crime."[9]

9. Indeed, it is not even clear that the "reasonable" adult anticipates that accusatory statements made to the police may be used at trial. Research on adult domestic violence victims' calls to the police has found that many victims do not want the police to make an arrest, much less for the district attorney to pursue prosecution. *See, e.g.*, Robert Apsler et al., *Perceptions of the Police by Female Victims of Domestic Partner Violence*, 9 Violence Against Women 1318, 1326, Table 1 (2003) (only 1/3 of victims reporting abuse to police wanted arrest).

In sum, these judicial and scholarly struggles with the "reasonable person" test for children declarants reveal the inherent problem with *any* test that seeks to define "testimonial" based on a declarant's state of mind. An inflexible objective test all but begs for exceptions for certain classes of declarants (*e.g.*, children, the mentally retarded), while the subjective approaches would require courts to do exactly what Petitioner Hammon says they should not: "flail about in the dark in an attempt to understand the psyche of a speaker who is not even testifying in court." (Hammon Pet. Br. 18.) That the proposed test here is unworkable for many child abuse cases—one of the core areas of law impacted by *Crawford*—is telling. More telling is that a resemblance test, which puts the focus on the actions of the police, bypasses most, if not all, of these difficulties.

### B. Petitioners' Test Is Overbroad Because It Could Potentially Define as "Testimonial" Reports of Abuse by Children to Family Members.

Petitioners' proposed test also is overbroad because it could encompass statements made to non-governmental officials. (Hammon Pet. Br. 17 ("[F]or a statement to be deemed testimonial, it is not essential that it be received by a government officer.")).

Again, child maltreatment cases illustrate the flaws with such an approach. Children typically disclose the abuse (if ever) to a trusted adult: a parent, a teacher, or a friend. Smith et al., *supra*, at 279. Petitioners would have courts attempt to determine whether a "reasonable person" making such disclosures would anticipate that the listener would report those statements to authorities for use in prosecution. Determining the mental state of a "reasonable person" in such circumstances would be unworkable. For instance, would a "reasonable person" assume that disclosure to an adult will

result in official intervention? If so, he would be wrong. Christopher Bagley & Richard Ramsay, *Sexual Abuse in Childhood: Psychosocial Outcomes and Implications for Social Work Practice*, 4 J. Soc. Work & Hum. Sexuality 33, 37 (1986) 37 (majority of disclosures to adults did not result in reports to authorities). Would a "reasonable person" be aware of applicable mandatory reporting laws, or how mandated reporters interpret and respond to those laws? *See* Nat'l Clearinghouse on Child Abuse and Neglect Information, *Mandatory Reporters of Child Abuse and Neglect* (2003) (documenting variability among states regarding who is mandated to report); Steven Delaronde et al., *Opinions Among Mandated Reporters Toward Child Maltreatment Reporting Policies*, 24 Child Abuse & Neglect 901 (2000) (finding variability among mandated reporters in their tendency to report).

Further, this broad approach is not rooted in the text of the Sixth Amendment. As one scholar explained:

> When Abner tells his best friend Betty—before the government has even appeared on the scene—that he saw Carl rob the liquor store, Abner is not a Confrontation Clause "witness" simply because Betty later takes the stand against Carl, and tells the jury what Abner told her. Within the meaning of hearsay doctrine and evidence law, Abner may indeed be an "out-of-court declarant" . . . . But this is not the proper test of the meaning of the word "witness[]" in the Constitution's Confrontation Clause. Within the meaning of both constitutional law—as evidenced by text, history, and structure—and common sense, Betty is the "witness," not Abner.

Akhil Reed Amar, *Confrontation Clause First Principles: A Reply to Professor Friedman*, 86 GEO. L.J. 1045, 1045-46 (1998) (footnote omitted).

### C. Petitioners' Test Is Inconsistent with Admission of Children's Out-of-Court Statements Reporting Child Sexual Abuse in 18th Century Trials.

Beyond the textual deficiencies with Petitioners' proposed test, child sexual abuse cases decided around the time of the Framing refute any notion that all out-of-court statements by child victims are "testimonial." At that time, courts frequently admitted out-of-court disclosures of sexual abuse made by children to trusted adults, even when the child was unavailable for cross-examination.[10] Child rape trials in London's Old Bailey courthouse between 1744 and 1779 illustrate the point.[11] For example, in *R. v. Allam* (Old Bailey Proceedings Sept. 7, 1768), *available at* http://

10. A rule of best evidence was the central guiding principle for the admissibility of extrajudicial statements during the 1700s. *See* 1 Geoffrey Gilbert, *The Law of Evidence* 3-4 (Lintot 1756). A party was required to produce the best evidence that was in their possession or control. *Id.*; Francis Buller, *An Introduction to the Law Relative to Trials at Nisi Prius* 293 (I. Riley & Co. 1806); Thomas Peake, *A Compendium of the Law of Evidence* 8 (P. Byrne 1806). If a child was deemed incompetent to testify, her out-of-court statements could be heard utilizing a best evidence rationale: they constituted the best evidence available of her complaint.

11. Reports of these trials are available on a searchable database at www.oldbaileyonline.org. The database revealed no further proceedings in the cases discussed herein. It should be noted that

> To write legal history from the [Old Bailey Proceedings] is . . . a perilous undertaking which we would gladly avoid if superior sources availed us. However, on the present state of our knowledge about the best surviving sources, it has to be said that the [Old Bailey Proceedings] are probably the best accounts we shall ever have in what transpired in ordinary English criminal courts before the later eighteenth century.

John H. Langbein, *The Criminal Trial Before the Lawyers*, 45 U. Chi. L. Rev. 261, 271 (1978).

www.oldbaileyonline.org/html_units/1760s/t17680907-40.html, the mother of the eight-year-old victim testified to the following: "the child then said, William Allam had had to do with her in the shed two days before. . . . [S]he said the first time was in the shed, when the peas were in blossom; I understood by the child he had had to do with her three times." The child did not testify in the proceedings, yet the mother was still permitted to testify as to what her daughter had told her regarding the rape. *See id.*

Similarly, in *R. v. Craige* (Old Bailey Proceedings July 3, 1771), *available at* http://www.oldbaileyonline.org/html_units/1770s/t17710703-33.html, the court permitted a neighbor to testify as to what he was told by the ten-year-old victim:

> [The child] burst out a crying, and said I will tell you who it was if you won't tell my dada; I said I would not, but would tell her mama. She said it was Mr. Craige. I asked her who he was; she said, the man that work'd for her father. I asked her how he met with her; she said she was playing with some peas, tossing them up upon the bed, as she sat in the room playing with her doll. As she went to get some of the peas, he throw'd her upon the bed, and did something that hurt her, and pressed her so hard upon her belly that she could eat no victuals all next day.

*Id.* The child never testified. *See id.*; *see also R. v. Ketteridge* (Old Bailey Proceedings Sept. 15, 1779), *available at* http://www.oldbaileyonline.org/html_units/1770s/t17790915-18.html (admitting the four-year-old child's out-of-court statement identifying the alleged abuser and the details of the rape); *R. v. Tibbel* (Old Bailey Proceedings Oct. 16, 1765), *available at* http://www.oldbaileyonline.org/html_units/

1760s/t17651016-2.html (allowing the child victim's mother to testify that her daughter told her that the injuries to her genitals were caused by the defendant); *R. v. Crosby* (Old Bailey Proceedings Dec. 7, 1757), *available at* http://www.oldbaileyonline.org/html_units/1760s/t17660903-38.html (mother testified that her daughter told her "Mr. Crosby did it, the day his wife went to the hospital, and left me there; he got into bed, and call'd me to him. I went to him. Then he pull'd me to him, and put his c - k to me there, and hurt me sadly" and the child victim did not testify); *R. v. Moulcer* (Old Bailey Proceedings Oct. 17, 1744), *available at* http://www.oldbaileyonline.org/html_units/1740s/t17441017-25.html (mother testified that her daughter, who did not testify, told her "Francis Moulcer had taken her into a shed, and laid her down on the top of some hides, and pulled down his breeches and lay with her").[12]

The Old Bailey Proceedings illustrate that, around the time of our Founding, parents and other adults frequently were permitted to testify regarding out-of-court statements by minors, even when those statements identified the alleged abuser and the alleged crime.

*R. v. Brasier*, 1 Leach 199, 168 E.R. 202 (1779), relied on by Petitioner Hammon, is not to the contrary. (*See*

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12. Although a number of these cases resulted in acquittal, this is consistent with acquittal rates for eighteenth-century rape cases in general. Low conviction rates may be explained by a requirement that the government prove penetration, *see, e.g.*, 1 Hale, *supra*, at 628, and in part from the overwhelmingly skeptical attitude with which rape accusations were viewed during the era. This highlights to some degree the significant societal and legal changes concerning child abuse that have taken place since 1791. *See* Myrna Raeder, *Remember the Ladies and the Children Too*, 71 Brook. L. Rev. 311, 311-12, 314 (2005) (questioning historic approach to Confrontation Clause given societal changes concerning domestic violence and child abuse).

Hammon Pet. Br. 27.) In *Brasier*, a five-year-old made a report of sexual assault to her mother, who testified to it at trial. *Brasier*, 168 Eng. Rep. at 202; 1 Edmond Hyde East, *A Treatise of the Pleas of the Crown* 443 (1806). The trial judge reserved the case for review, asking whether the child should have been allowed to testify unsworn. *Brasier*, 168 Eng. Rep. at 202 ("the judgment was respited, on a doubt, created by a marginal note" citing, *inter alia*, 1 Hale, *supra*, at 634; 2 Hale, *supra*, at 279).[13] The reviewing court considered and rejected Hale's proposal that a child could testify in court without taking the oath, holding "[t]hat no testimony whatever can be legally received except upon oath." *Brasier*, 168 Eng. Rep. at 202; *see also* 1 East, *supra*, at 443. The reviewing court added that the girl should not have been automatically presumed unavailable and incompetent to testify due to her age. *See Brasier*, 168 Eng. Rep. at 202-03; 1 East, *supra*, at 444. Rather, the trial court should have examined the girl to assess her ability to understand the oath. *See Brasier*, 168 Eng. Rep. at 202-03. Hence, her out-of-court statements were not the best evidence available, and the defendant was pardoned. The case simply does not address a situation in which a child is properly found incompetent to testify and her out-of-court statements are offered.

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13. Because young children were presumed incompetent, Hale proposed that courts hear children's unsworn testimony. 1 Hale, *supra*, at 634. Hale noted that parents were allowed to testify to their children's informal complaints; therefore, it made sense to hear directly from the children themselves: "Because if the child complains presently of the wrong done to her to the mother or other relations, their evidence upon oath shall be taken; yet it is but a narrative of what the child told them without oath, and there is much more reason for the court to hear the relation of the child herself." 1 Hale, *supra*, at 634-35. *See also* 1 East, *supra*, at 441 (stating same). Hale justified this procedure by citing the best evidence rationale for admission: "The nature of the offense, which is most times secret, and no other testimony can be had of the very doing of the fact, but the party upon whom it is committed." 1 Hale, *supra*, 634; *see also* 2 Hale, *supra*, at 279 (stating that the "exigence of the case requires" examining young children unsworn).

Petitioner Hammon, however, depends on *Brasier* for a very different and far more expansive proposition—that a victim's informal statements are "testimony" that can *only* be given in court under oath. (Hammon Pet. Br. 27.) This reading would render all hearsay inadmissible, and is clearly overly broad. Moreover, it misreads the court's use of the word "testimony," which appears twice in the opinion: "That no testimony whatsoever can be legally received except upon oath," 168 Eng. Rep. at 202, and "if [children] are found incompetent to take an oath their testimony cannot be received," *id.* at 203. This discussion is not about confrontation rights, but about the necessity of the oath and the procedure by which children are qualified to take the oath.

* * *

Petitioners' overbroad "reasonable person" test would further silence child victims and impede the States' ability to prosecute abusers. The test is contrary to *Crawford* and the history and text of the Sixth Amendment. It should be rejected in favor of a standard that treats as "testimonial" only those statements that were produced from the abusive practices the Confrontation Clause was designed to prevent.

## CONCLUSION

For the foregoing reasons, the judgments in *Davis* (05-5224) and *Hammon* (05-5705) should be affirmed.

Respectfully submitted,

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No. 05-5705

IN THE

# Supreme Court of the United States

HERSHEL HAMMON,

*Petitioner*,

v.

STATE OF INDIANA,

*Respondent*.

**On Writ of Certiorari to the Indiana Supreme Court**

## BRIEF OF *AMICI CURIAE* THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND THE PUBLIC DEFENDER SERVICE FOR THE DISTRICT OF COLUMBIA IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS


| | Page |
|---|---|
| TABLE OF AUTHORITIES | ii |
| INTEREST OF *AMICI CURIAE* | 1 |
| STATEMENT OF THE CASE | 3 |
| SUMMARY OF ARGUMENT | 3 |
| ARGUMENT | 5 |
| THIS COURT SHOULD ADOPT A CATEGORICAL DEFINITION OF "TESTIMONIAL" STATEMENTS THAT, AT THE VERY LEAST, REQUIRES CONFRONTATION AT TRIAL FOR ALL ACCUSATORY STATEMENTS MADE TO KNOWN GOVERNMENT AGENTS | 5 |
| A. *Amici's* Rule Reflects The Original Purpose Of The Confrontation Clause, Reaffirmed in *Crawford v. Washington*, To Permanently Ensure An Adversarial Mode of Criminal Trials | 5 |
| B. *Amici's* Rule Will Fulfill The Promise Of *Crawford v. Washington* By Fully Eradicating The Vestiges Of *Ohio v. Roberts* | 9 |
| C. *Amici's* Rule Negates Any Perverse Incentives For Law Enforcement To Divert Its Energy From Investigation To The Creation of "Unconfrontable" Statements | 17 |
| D. *Amici's* Rule Will Withstand The Ever-Present Pressure From The Government To Curtail Confrontation, Thus Providing Effective Protection Against Future Confrontation Abuses | 21 |

TABLE OF CONTENTS—Continued

Page

E. *Amici's* Rule Will Not Impede The Government From Obtaining Legitimate Convictions .. 24

CONCLUSION ..... 30

# TABLE OF AUTHORITIES

CASES Page

*Brawner v. State*, 602 S.E.2d. 612 (Ga. 2004) ..... 11
*Crawford v. Washington*, 541 U.S. 36 (2004) ..... *passim*
*Evans v. State*, 838 So.2d 1090 (Fla. 2002) ..... 14
*Garrett v. State*, 1999 WL 542577 (Tex. App. July 28, 1999) ..... 25
*Hammon v. State*, 829 N.E.2d 444 (Ind. 2005) ..... 13
*In re E.H.*, 823 N.E.2d 1029 (Ill. App.), *appeal allowed*, 833 N.E.2d 2 (Ill. 2005) ..... 11
*Jenkins v. State*, 604 S.E.2d 789 (Ga. 2004) ..... 10-11
*Jimenez v. State*, 2004 WL 1832719 (Cal. App. Aug. 17, 2004), *cert. denied, Jimenez v. California*, 125 S. Ct. 1713 (2005) ..... 19, 20, 25
*Jones v. United States*, 829 A.2d 464 (D.C. 2003) ... 23
*Keller v. State*, 431 S.E.2d 411 (Ga. App. 1993) ... 15
*Lee v. Illinois*, 476 U.S. 530 (1986) ..... 6
*Lopez v. State*, 888 So.2d 693 (Fla. App. 2004) .... 25
*Mason v. State*, 173 S.W.3d 105 (Tex. App. 2005) ..... 11
*Mattox v. United States*, 156 U.S. 237 (1895) ..... 6
*Moody v. State*, 594 S.E.2d 350 (Ga. 2004) ..... 11
*Ohio v. Roberts*, 448 U.S. 56 (1980) ..... 2-3
*People v. Cortes*, 781 N.Y.S.2d 401 (N.Y. Sup. Ct. 2004) ..... 11
*People v. Herrera*, 2005 WL 2249772 (Cal. App.), *review denied*, (Nov. 30, 2005) ..... 25
*People v. Ramirez*, 2004 WL 136402 (Mich. App.), *appeal denied*, 685 N.W.2d 671 (Mich. 2004) ..... 15
*People v. Ruiz*, 2004 WL 2383676 (Cal. App. Oct. 26, 2004), *review granted*, (Jan. 19, 2005) ..... 27
*People v. Simpson*, 656 N.Y.S.2d 765 (N.Y. App. 1997) ..... 15

TABLE OF AUTHORITIES—Continued

Page

*Smith v. United States*, 666 A.2d 1216 (D.C. 1995) ..... 15
*State v. Alvarez*, 107 P.3d 350 (Ariz. App. 2005), *review granted in part* (Nov. 29, 2005) ..... 25
*State v. Anderson*, 2005 WL 171441 (Tenn. App.), *appeal granted* (June 20, 2005) ..... 25
*State v. Ballos*, 602 N.W.2d 117 (Wis. App. 1999) ..... 25
*State v. Branch*, 865 A.2d 673 (N.J. 2005) ..... 11
*State v. Brown*, 903 P.2d 459 (Wash. 1995) ..... 15
*State v. Clark*, 598 S.E.2d 213 (N.C. App.), *review denied*, 601 S.E.2d 866 (N.C. 2004) ..... 11
*State v. Davis*, 111 P.3d 844 (Wash. 2005) ..... 13
*State v. Grace*, 111 P.3d 28 (Haw. App.), *cert. denied*, 113 P.3d 799 (Ha. 2005) ..... 11
*State v. Hill*, 827 N.E.2d 351 (Ohio App.), *appeal not allowed*, 833 N.E.2d 1250 (Ohio 2005) ..... 11
*State v. Kester*, 2001 WL 884155 (Del. Super. Ct. July 31, 2001) ..... 25
*State v. King*, 121 P.3d 234 (Colo. App.), *cert. denied*, 2005 WL 3073374 (Colo. Oct. 17, 2005) ..... 25
*State v. Siler*, 2003 WL 22429053 (Ohio App. 2003), *cert. granted and judgment vacated in light of Crawford v. Washington by Siler v. Ohio*, 125 S. Ct. 671 (2004) (No. 04-6765) ..... 25
*State v. Snowden*, 867 A.2d 314 (Md. 2005) ..... 11
*United States v. Bordeaux*, 400 F.3d 548 (8th Cir. 2005) ..... 10
*United States v. Cromer*, 389 F.3d 662 (6th Cir. 2004) ..... 10
*United States v. Joy*, 192 F.3d 761 (7th Cir. 1999) ..... 25

TABLE OF AUTHORITIES—Continued


| | Page |
|---|---|
| *United States v. Solomon*, 399 F.3d 1231 (10th Cir. 2005) | 10 |
| *United States v. Summers*, 414 F.3d 1287 (10th Cir. 2005) | 10 |
| *United States v. Washington*, 263 F. Supp. 2d 413 (D. Conn. 2003) | 14 |
| *United States v. Wilmore*, 381 F.3d 868 (9th Cir. 2004) | 14 |
| *White v. Illinois*, 502 U.S. 346 (1992) | 10 |
| **CONSTITUTIONAL PROVISIONS** | |
| U.S. Const. amend. VI | 2 |
| **STATUTES AND RULES** | |
| Fed. R. Evid. 803(4) | 10 |
| D.C. Code § 16-1031 | 8 |
| Wash. Rev. Code § 10.31.100(2) | 8 |
| Wash. Rev. Code § 26.50.110(2) | 8 |
| **OTHER AUTHORITY** | |
| American Prosecutor's Research Institute, *Creative Prosecution* (www.ndaa-apri.org/apri/programs/vawa/creative_prosecution.html) | 26 |
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| Baugh, Whitney, *Why the Sky Didn't Fall: Using Judicial Creativity to Circumvent* Crawford v. Washington, 38 Loyola L.A.L.Rev. 1835 (2005) | 12, 16 |
| Bigornia, Luisa, *Alternatives to Traditional Prosecution of Spousal Abuse*, 11 J. Contemp. Legal Issues 57 (2000) | 21 |

TABLE OF AUTHORITIES—Continued

Page

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Byrom, Celeste E., Note, *The Use of the Excited Utterance Hearsay Exception in the Prosecution of Domestic Violence Cases After* Crawford v. Washington, 24 Rev. Litig. 409 (2005)..... 13

Corsilles, Angela, Note, *No-Drop Policies In the Prosecution of Domestic Violence Cases: Guarantee to Action or Dangerous Solution?*, 63 Fordham L. Rev. 853 (1994) ..... 8, 23

Davis, Wendy N., *Hearsay, Gone tomorrow*? 90 ABA Journal 22 (Sept. 2004) ..... 18

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TABLE OF AUTHORITIES—Continued

Page

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Page

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IN THE

# Supreme Court of the United States

No. 05-5705

HERSHEL HAMMON,

*Petitioner*,

v.

STATE OF INDIANA,

*Respondent*.

**On Writ of Certiorari to the Indiana Supreme Court**

## BRIEF OF *AMICI CURIAE* THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND THE PUBLIC DEFENDER SERVICE FOR THE DISTRICT OF COLUMBIA IN SUPPORT OF PETITIONER

## INTEREST OF *AMICI CURIAE*

*Amicus curiae* National Association of Criminal Defense Lawyers is a non-profit corporation with a membership of more than 10,000 attorneys nationwide, along with 78 state and local affiliate organizations numbering 28,000 members in 50 states.[1] *Amicus curiae* Public Defender Service for the District of Columbia represents indigent criminal defendants. *Amici* participated in this case at the certiorari stage, sub-

[1] Accompanying this brief are letters of consent to its filing. No counsel for any party authored any part of this brief, and no person or entity, other than *amici*, has made a monetary contribution to the preparation or submission of this brief.

mitting briefs that urged this Court to grant review both in this case and in *Davis v. Washington*, Docket No. 05-5224.

Central to our role as criminal defense lawyers, *amici* assist "accused" persons in exercising their Sixth Amendment right to "be confronted with the witnesses against" them. U.S. Const. amend. VI. In many cases handled by *amici,* the right to confrontation still serves its traditional function of ensuring the adversarial mode of a criminal trial, where witnesses testify in open court, before the trier-of-fact, subject to cross-examination. But *amici* have too often been required to represent defendants in cases like Mr. Hammon's and Mr. Davis'—cases in which the government's proof consists of nothing more than the recitation of accusatory post-incident statements made by an absent witness to a police officer or a 911 operator. From a criminal defense perspective, such "witnessless" prosecutions[2] present grave dangers: They allow the accuser to level charges from somewhere other than the open courtroom, thereby escaping public scrutiny; defense counsel is never permitted to perform her most valuable function for her client—cross-examination of witnesses face-to-face in open court before the fact-finder; and the fact-finder is prevented from serving as the real arbiter of the reliability of the accusations.

Because such "witnessless" prosecutions were generally forbidden in the United States for almost two hundred years under the commonly accepted understanding of the right to confrontation, and because they gained some measure of approbation only in the wake of this Court's decision in *Ohio*

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[2] Such prosecutions are also known as "victimless" or "evidence-based" prosecutions. But because there are, in fact, alleged victims in these cases (whether they appear at trial or not), and because all cases are "evidence-based," *amici* use the term "witnessless" in order to reflect the essence of these prosecutions, which is their lack of percipient witnesses at trial.

*v. Roberts,* 448 U.S. 56 (1980), *amici* are the first generation of American defense lawyers to have experience representing their clients under such adverse conditions. Based on our knowledge of the inherent problems with these trials, *amici* urge this Court to continue down the path already charted in *Crawford v. Washington*, 541 U.S. 36 (2004), by reviving the common-law understanding of the Sixth Amendment and thereby ensuring that in-court confrontation of percipient witnesses is again the norm. *Amici* believe that the only way to accomplish this goal is to adopt a bright-line definition of "testimonial" statements protected by the Confrontation Clause that, at the very least, specifically requires confrontation at trial for all accusatory statements made to known government agents. *Amici* support Mr. Hammon and Mr. Davis in hopes that this Court will use their cases to adopt such a rule.

## STATEMENT OF THE CASE

Hershel Hammon's conviction for domestic battery rests entirely on the testimony of Peru, Indiana police officer Jason Mooney, who witnessed none of the pertinent events that precipitated the charges. *See* Petitioner's Cert. Petition at 2-3. Even so, Officer Mooney was the prosecution's star witness because he was able to relay at trial the information he had obtained by questioning Mr. Hammon's accuser (Amy Hammon) during his investigation of the incident. *Id.* *Amici* adopt Petitioner's statement of the case.

## SUMMARY OF ARGUMENT

*Amici* urge this Court to adopt a bright-line definition of "testimonial" statements protected by the Confrontation Clause that, at the very least, requires confrontation at trial for all accusatory statements made to known government agents. In every case, such statements look like testimony, sound like testimony, function as testimony at trial, and accordingly lie at the heart of the confrontation guarantee. A categorical rule

ensuring the presentation of these core testimonial statements through face-to-face testimony, before the trier-of-fact, subject to cross-examination, will best fulfill the Court's stated mission in *Crawford* of reviving the original purpose of the Confrontation Clause: to permanently ensure an adversarial mode of criminal trials. To be sure, this bright-line test does not purport to define the universe of "testimonial" statements. But for the large group of core statements that fall within its ambit—such as those in both *Hammon* and *Davis v. Washington*—it will establish an easily administered rule that clearly defines for courts and counsel alike when in-court confrontation of witnesses is required. Adopting such a test will eliminate the great bulk of lower court confusion over what constitutes a "testimonial" statement in the post-*Crawford* era.

The categorical rule *amici* propose will destroy the vestiges of *Ohio v. Roberts,* which can be seen in some courts' post-*Crawford* decisions—both in their over-willingness to excuse confrontation of witnesses who made "excited" "emergency" or "preliminary" testimonial statements, and in their reliance upon subjective, unpredictable, multi-factored tests in an effort to discern what is testimonial. *Amici's* rule will also negate any perverse incentives for the government to abridge or alter otherwise sound investigative procedures so as to end-run confrontation requirements. And *amici's* rule will withstand the ever-present pressure from the government to curtail confrontation—pressure which is part of the natural dynamic of our adversarial system—thus providing effective protection against future confrontation abuses.

Finally, there is no downside to *amici's* categorical rule—at least no downside that would have mattered to the Framers. The government should be able to prosecute all of its cases, even its domestic violence cases, within the adversarial mode of criminal trial that the Sixth Amendment requires. Indeed,

any conviction contingent on evading the Sixth Amendment confrontation guarantee is not a conviction the Framers would have valued.

## ARGUMENT

## THIS COURT SHOULD ADOPT A CATEGORICAL DEFINITION OF "TESTIMONIAL" STATEMENTS THAT, AT THE VERY LEAST, REQUIRES CONFRONTATION AT TRIAL FOR ALL ACCUSATORY STATEMENTS MADE TO KNOWN GOVERNMENT AGENTS.

### A. *Amici's* Rule Reflects The Original Purpose Of The Confrontation Clause, Reaffirmed in *Crawford v. Washington*, To Permanently Ensure An Adversarial Mode of Criminal Trials.

*Amici* advocate a categorical rule that requires confrontation for all accusatory statements to known government agents because such a rule best reflects the original purpose of the Confrontation Clause. As this Court's decision in *Crawford v. Washington*, 541 U.S. 36 (2004), made clear, when the Framers of the Constitution drafted the Confrontation Clause of the Sixth Amendment, they chose what they wanted a criminal trial to look like. Rejecting the continental mode of judicial inquisition and trial by dossier, the Framers embraced the English and early American common-law practice of requiring witnesses to testify in court, under oath, in the presence of the defendant and the fact-finder, and subject to cross-examination. *Crawford*, 541 U.S. at 43 (in contrast to the civil law, "the common-law tradition is one of live testimony in court subject to adversarial testing"); *id.* at 50 ("the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure"); *id.*

at 54 (Confrontation Clause is "most naturally read as a reference to the right of confrontation at common law").[3]

The method of criminal trial endorsed by the Framers and reaffirmed by *Crawford* not only seeks to ensure that convictions be based on reliable evidence, but also mandates that reliability be established in one way and one way only—through the crucible of adversarial testing. *Crawford*, 541 U.S. at 61-62 ("[The Confrontation Clause] is a procedural rather than a substantive guarantee. It commands . . . that reliability be assessed . . . by testing in the crucible of cross-examination . . . . [and] thus reflects a judgment, not only about the desirability of reliable evidence . . . , but about how reliability can best be determined."); *see also id.* at 69 ("the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation").

Equally important, pursuant to this adversarial method of conducting a trial, (1) the defendant is assured the opportunity to meet his accuser "face to face," *Crawford*, 541 U.S. at 43-44; *see also id.* at 57 (quoting *Mattox v. United States*, 156 U.S. 237, 244 (1895)); (2) the public is assured transparency of process, *see Lee v. Illinois*, 476 U.S. 530, 540 (1986) (The Confrontation Clause "promote[s] to the greatest possible degree society's interest in having the accused and accuser engage in an open and even contest in a public trial"); Sir William Blackstone, 3 *Commentaries on the Laws of England* *373 (1765-69 ed.) (http://www.yale.edu/lawweb/avalon/blackstone/bk3ch23.htm) (approving the "open examination of witnesses viva voce, in the presence of all mankind" as opposed to private, secret examinations), and (3) the fact-finder is

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[3] Because testimonial dying declarations appear to have been admitted at trial without confrontation at common law, *see Crawford*, 541 U.S. at 56 n.6, *amici's* categorical rule may also be subject to this limited exception.

assured first-hand access to the evidence presented.[4] *See id.* at *374 ("[B]y this method of examination and this only, the . . . [fact-finder has] an opportunity of observing the quality, age, education, understanding, behavior, and inclinations of the witness; in which points all persons must appear alike, when their depositions are reduced to writing.").

Assuredly, this adversarial method of trial has its costs. The right to confrontation, like other Sixth Amendment guarantees (*e.g.*, the right to counsel, the right to compulsory process) and due process protections (*e.g.*, the standard of proof beyond a reasonable doubt), makes it more difficult for the government to obtain convictions. But that is the balance the Framers struck, with the expectation that the government could work effectively within this adversarial system and that any burden on the government would be more than offset by the dividends in the fairness, justice, and public trust this system would promote. *See* Kenneth W. Graham Jr., *The Right of Confrontation and the Hearsay Rule. Sir Walter Raleigh Loses Another One*, 8 Crim. L. Bulletin 99, 121 (1972) ("*the function of the Confrontation Clause . . . was to place the risk of absence of reliable evidence of guilt or innocence upon the state rather than the defendant*") (emphasis in original).

In the context of the adversarial method of conducting criminal trials that the Framers adopted and this Court reaffirmed in *Crawford*, accusatory statements to known government agents are clearly identifiable as core "testimonial" statements. For a number of reasons, an accuser who makes his statements to a responding police officer or a 911 operator operates every bit as much as a "witness against" the accused

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[4] Indeed, because the right to cross-examination did not fully develop until defendants were granted the right to counsel, *see* Randolph N. Jonakait, *The Origins of the Confrontation Clause: An Alternative History*, 27 Rutgers L.J. 77, 82-83, 92 (1995), these other attributes of confrontation initially took precedence over the right to cross-examination.

within the meaning of the Sixth Amendment as an accuser who takes the stand in court.

First, a direct accusation to the police sets the machinery of our criminal justice system in motion toward the ultimate end of securing a conviction. It is always the responsibility of a law enforcement agent to collect and preserve evidence for prosecutorial use. Thus, when a witness makes an accusatory statement to a known government agent, he or she is inviting a government response—a response that always includes the possibility that the accused will be deprived of liberty, whether or not the witness is consciously aware of this fact, and whether or not this is the witness' primary purpose. Indeed, this is particularly true in the domestic violence context because many states have mandatory arrest laws and "no drop" policies.[5]

Second, given their status as direct evidence of guilt, criminal accusations to police or a 911 operator are the very statements that the government will seek to rely upon to establish guilt at trial.

Third, and relatedly, these are the statements—direct, inculpatory narratives by someone who purports to have personal knowledge of the crime—that the defendant will most need to probe and challenge in order to mount a defense.

Finally, and for the same reasons, these are the very statements that the fact-finder will weigh most heavily in deliberating to reach a verdict.

In short, accusatory statements to known government agents look like testimony, sound like testimony, and are treated as testimony at trial. As such they should be given

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[5] *See* Friedman, Richard D. & Bridget McCormack, *Dial-in Testimony*, 150 U. Pa. L. Rev. 1171, 1184, 1188 (2002); Angela Corsilles, Note, *No-Drop Policies In the Prosecution of Domestic Violence Cases: Guarantee to Action or Dangerous Solution?*, 63 Fordham L. Rev. 853 (1994); *see e.g.*, D.C. Code § 16-1031; Wash. Rev. Code §§ 10.31.100(2) & 26.50.110(2).

"testimonial" status under the Sixth Amendment. This is the only way to realize the aim of the Framers, reaffirmed by this Court in *Crawford*, to promote an adversarial mode of criminal trial where testimony is presented in court, under oath, in the presence of the defendant and the fact-finder, and subject to cross-examination.

### B. *Amici's* Rule Will Fulfill The Promise Of *Crawford v. Washington* By Fully Eradicating The Vestiges Of *Ohio v. Roberts*.

The Court's decision in *Crawford* promised to eradicate the amorphous, ad hoc confrontation exemption, established under *Ohio v. Roberts*, for "testimonial" statements subjectively deemed "reliable" by a judge. Adoption of *amici's* categorical rule requiring confrontation for accusatory statements to known government agents is a necessary step in fulfilling that promise.

As this Court recognized in *Crawford*, the *Ohio v. Roberts* rule frustrated the object of the Confrontation Clause to provide a categorical guarantee of an adversarial mode of trial by allowing confrontation to be dispensed with upon a simple showing of reliability. *Crawford*, 541 U.S. at 60-62. To make matters worse, this reliability standard contained no uniform, objective measures. *Id.* at 61, 63. Courts could find that out-of-court statements were reliable because, in the court's subjective opinion, they had indicia of trustworthiness. Alternatively, courts could use hearsay exceptions as a proxy for assessing reliability, a practice which imposed no practical limits on courts' discretion. These hearsay exceptions were so malleable and expansive that, if a court subjectively believed an out-of-court statement to be trustworthy, it was likely that a hearsay exception could be made to apply.

This was especially true with respect to the modern[6] hearsay exceptions for "excited utterances" and "spontaneous declarations." The temporal boundaries of these exceptions were elastic (generally expanding to encompass the after-the fact narrative statements the prosecution needed to prove its case so long as some showing of emotional upset or spontaneity could be made). Moreover, there was no need for the prosecution to prove witness unavailability in order to obtain the benefit of these exceptions. *See* Fed. R. Evid. 803(4); *White v. Illinois*, 502 U.S. 346 (1992). Thus, these exceptions could be and were applied to encompass a wider and wider number of unconfronted criminal accusations. *See Davis* Cert. Petition at 21-23 (citing examples).

*Crawford* sent a clear message that *Ohio v. Roberts'* culture of permissive confrontation exceptions was no longer acceptable by reaffirming that the right to confrontation is a "categorical" "procedural" guarantee, 541 U.S. 61, 67-68, founded on the common-law right to confrontation, *id.* at 43, 54, 68. A number of courts have received this message,[7]

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[6] Apart from the narrowly construed exception for statements that were part of the "res gestae"—*i.e.*, statements that were made contemporaneously with the incident at issue and were part of the incident in some way—no exception for "excited" or "spontaneous" statements existed at common law or at the time the Sixth Amendment was drafted. *See Crawford*, 541 U.S. at 58 n. 8 (doubting the existence at common law of any exception for spontaneous declarations); 3 John Henry Wigmore, *Evidence* §§ 1746-50 at 2248-60 (1904 ed.) (advocating recognition of this previously nonexistent exception); Robert P. Mosteller, *Crawford v. Washington: Encouraging and Ensuring the Confrontation of Witnesses*, 39 U. Rich. L. Rev. 511, 577 (2005) (current conception of "excited" declarations "is much more expansive" than when this exception first emerged; "only a few of the statements currently received under it would likely meet [its] more limited historical antecedent").

[7] *See, e.g., United States v. Bordeaux*, 400 F.3d 548, 555-56 (8th Cir. 2005); *United States v. Summers*, 414 F.3d 1287, 1300-03 (10th Cir. 2005); *United States v. Solomon*, 399 F.3d 1231, 1237 (10th Cir. 2005); *United States v. Cromer*, 389 F.3d 662, 674-75 (6th Cir. 2004); *Jenkins v.*

recognizing that *Crawford* has "fundamentally alter[ed] nearly a quarter century of confrontation clause jurisprudence." *State v. Grace*, 111 P.3d 28, 35 (Haw. App.), *cert. denied*, 113 P.3d 799 (Ha. 2005).

But some courts, like those below and in *Davis*, have struggled to limit *Crawford*, construing it as a narrow ruling that, like *Ohio v. Roberts*, permits routine departures from the adversarial mode of criminal justice. Part of the lower court confusion may be excused as an inevitable result of the fact that *Crawford* itself did not involve a statement by a classic "accuser." Sylvia Crawford had provided police with an ambiguous, muddled account of events that potentially inculpated her husband, although it did not purport on its face to do so. 541 U.S. at 39-40, 66-67. *Crawford* thus did not directly address the "testimonial" status of accusatory statements made after the completion of a crime, to known government agents. Even so, much of the lower court confusion is itself puzzling as the Court provided many indications that any definition of "testimonial" would necessarily include such accusations.[8]

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*State*, 604 S.E.2d 789, 605-06 (Ga. 2004); *Moody v. State*, 594 S.E.2d 350, 353-54 (Ga. 2004); *Brawner v. State*, 602 S.E.2d. 612, 613-15 (Ga. 2004); *In re E.H.*, 823 N.E.2d 1029, 1036-37 (Ill. App.), *appeal allowed*, 833 N.E.2d 2 (Ill. 2005); *State v. Snowden*, 867 A.2d 314, 322-29 (Md. 2005); *State v. Clark*, 598 S.E.2d 213, 219-220 (N.C. App.), *review denied*, 601 S.E.2d 866 (N.C. 2004); *State v. Hill*, 827 N.E.2d 351, 357-59 (Ohio App.), *appeal not allowed*, 833 N.E.2d 1250 (Ohio 2005); *Mason v. State*, 173 S.W.3d 105, 110-12 (Tex. App. 2005); *People v. Cortes*, 781 N.Y.S.2d 401 (N.Y. Sup. Ct. 2004); *cf. State v. Branch*, 865 A.2d 673, 690, 692 (N.J. 2005) (analyzing this Court's "watershed decision in *Crawford*" and limiting excited utterance exception in order to "pay proper respect to the principles animating our Confrontation Clause jurisprudence").

[8] *See, e.g., id.* at 43-50, 54 n.5 (reaffirming that the Sixth Amendment promotes the adversarial system of criminal justice founded on the "common law tradition . . . of live testimony in court"); *id.* at 43-44, 51 (acknowledging historical and textual support for the right to confront

Of particular concern here, some courts have taken advantage of this Court's perceived failure to expressly resolve the testimonial character of accusations to known government agents, and have continued to permit the government to use these unconfronted statements in witnessless trials by invoking the nebulous hearsay exception for excited utterances. These are the same types of unconfronted out-of-court statements that, while inadmissible at common law, only became admissible through the "reliability-based," nonadversarial mode of conducting criminal trials under *Ohio v. Roberts* and the concomitant expansion of the hearsay exception for "excited utterances" and "spontaneous declarations." Indeed, with other hearsay statements previously admitted under *Ohio v. Roberts* now clearly off-limits under *Crawford*, *see* 541 U.S. at 68, the absence of an explicit condemnation of the reliance on "excited" "spontaneous" statements to circumvent confrontation has created an incentive for these courts and the prosecutors who appear before them to expand their reliance on this hearsay exception.[9]

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one's "accuser" and particularly dwelling on the injustice of Sir Walter Raleigh's trial where he was not permitted to face his "accuser"); *id.* at 53, 56 n.7, 66 (indicating that "the involvement of government officers in the production" of witness statements raises Sixth Amendment concerns and rejecting the proposition that investigating officers could be "neutral"); *id.* at 52 n. 3 (noting that, although unsworn testimony at common law was generally inadmissible because of its perceived unreliability, "there is no doubt" that the Framers would have considered the Sixth Amendment a bar to the admission of such testimony without confrontation); *id.* at 58 n.8 (observing that the accusatory spontaneous declarations to police in *White v. Illinois* were "testimonial" and that their admission was "arguably in tension" with the court's historical interpretation of the Confrontation Clause because they would not have been admitted in criminal trials at common law).

[9] *See* Whitney Baugh, *Why the Sky Didn't Fall: Using Judicial Creativity to Circumvent* Crawford v. Washington, 38 Loyola L.A.L.Rev. 1835, 1869 (2005) (observing that "[a]lthough much of the *Crawford* opinion arguably supports an expansive interpretation of testimonial,

*Hammon* and *Davis* are part of this contingent. Purporting to rely on *Crawford*, they allow the admission without confrontation of accusatory statements to known government agents, so long as those statements were made while the declarant was in what could be (loosely) characterized as an "excited" state and within some more-restricted-but-as-yet-undefined temporal boundary that is defined either by an "emergency situation," or by the "preliminary" nature of the investigation conducted. *Hammon v. State*, 829 N.E.2d 444, 453, 457-58 (Ind. 2005); *State v. Davis*, 111 P.3d 844, 849-51 (Wash. 2005).

The response to *Crawford* by the Indiana and Washington Supreme Courts demonstrates why *amici's* proposed cate-

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many courts have found ways to circumvent the decision"); *see also id. at* 1853-60 (documenting reliance on hearsay exception for excited utterances in furtherance of this end); Celeste E. Byrom, Note, *The Use of the Excited Utterance Hearsay Exception in the Prosecution of Domestic Violence Cases After* Crawford v. Washington, 24 Rev. Litig. 409, 428 (2005) ("[T]he prosecutor should argue that *Crawford's* rule does not apply to excited utterances because (1) *Crawford* does not expressly overrule *White v. Illinios*, and (2) by definition, an excited utterance cannot be 'testimonial.'"); Adam M. Krischer, *Though Justice May Be Blind, It Is Not Stupid*, 38 Prosecutor 14, 16-17 (Dec. 2004) (www.ndaa-apri.org/publications/ndaa/toc_prosecutor.html) (using broadest formulation of testimonial in *Crawford* to argue that statements that look like excited utterances cannot be testimonial); Wendy Murphy, *New Strategies for Effective Child Abuse Prosecutions After Crawford*, 23 ABA Child Law Practice 129 (Oct. 2004) (http://www.abanet.org/child/database/abuseandneglect/Crawford.htm) (urging law enforcement to "develop protocols for identifying and recording excited utterances" on the assumption that obtaining victims' statements while they are still under the influence of startling events is sufficient to "get around *Crawford*"); Casey Gwinn, *Evidence Based Prosecution in the Aftermath of* Crawford v. Washington, Notice (Newsletter of the National Center on Domestic and Sexual Violence: www.ncdsv.org) (Fall 2004) at 1 ("[t]he key advocacy issue for evidence-based prosecution initiatives will be to establish that most hearsay evidence is not 'testimonial' under the concepts discussed in *Crawford*.")

gorical rule is needed. Clearly these courts, still under the sway of *Ohio v. Roberts*, misunderstand the purpose of the confrontation guarantee—*i.e.*, to promote a mode of criminal trial where confrontation is the norm. They misguidedly look to the timing of the statement and the emotional state of the speaker—two of the same factors courts looked to under *Ohio v. Roberts*—to determine if confrontation is required. But *amici's* rule recognizes that the precise timing of a post-incident accusation to a known government agent and the accuser's emotional state are immaterial in a system that values and promotes adversarial testing.

*Any* such accusation, even a hasty "excited" one made during a "preliminary" investigation (1) sets the machinery of our criminal justice system in motion toward the ultimate end of securing a conviction, (2) is used by the fact-finder in the same way to assess guilt and may serve as the sole or a critical basis for the fact-finder's decision to deprive the accused of his liberty, and (3) is subject to the same sorts of defects—error, incompleteness, or hidden bias—that the defense can only address through subjecting these accusations to the rigors of adversarial testing.

Indeed, the importance of subjecting hasty, unsworn, and often minimally documented accusations to the rigors of confrontation is, if anything, even greater. These "excited" accusations often will be the product of incomplete investigation in the first place and thus are particularly susceptible to error, lack of clarity, bias, and even malicious falsehood.[10]

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[10] *See e.g., United States v. Wilmore*, 381 F.3d 868, 869 (9th Cir. 2004) (911 caller falsely accused husband of robbing abortion clinic because she feared he would sell a Christmas gift for their children to get money for drugs); *United States v. Washington*, 263 F. Supp. 2d 413, 420 (D. Conn. 2003) (failure to disclose to defense that 911 caller had prior conviction for making a false report and was known to be a "persistent" liar); *Evans v. State*, 838 So.2d 1090, 1093 (Fla. 2002) (two witnesses who had "experienced several events startling enough to cause nervous excitement"

The contrary rule, where the right to confrontation is only triggered by statements made after the passage of time, upon reflection by the accuser and careful questioning by government agents—"turns logic on its head." Richard D. Friedman, *Grappling with the Meaning of Testimonial*, 71 Brooklyn L. Rev. 241, 248 (2005).

By the same token, *amici's* rule ensures that trial counsel is able to perform her constitutionally mandated function to probe and challenge these accusatory statements. When the accuser does not appear in court and the accuser's statements are presented second-hand, counsel is disabled in her efforts to mount a defense. The police officer relating the accuser's account will likely know and/or remember only those facts about the accuser and the accuser's statement that are recorded, possibly selectively, in the officer's notes. The officer will not be in a position to acknowledge on cross-examination, for example, any gaps in the accuser's knowledge, any impediments to the accuser's perception of events, or any biases the accuser holds against the defendant. And

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initially gave police false description of the shooter); *State v. Brown*, 903 P.2d 459, 463-64 (Wash. 1995) (911 call erroneously admitted as excited utterance, given caller's testimony that she had decided to fabricate portion of her story before making telephone call); *Smith v. United States*, 666 A.2d 1216, 1224-25 (D.C. 1995) (failure to disclose to defense that key eyewitness had admitted that claim to 911 operator that robber had stuck a gun in his face—which was admitted as excited utterance—was false); *People v. Ramirez*, 2004 WL 136402 (Mich. App.), *appeal denied*, 685 N.W.2d 671 (Mich. 2004) (initial "excited" statement by mugging victim to police that defendant had a gun was incorrect); *People v. Simpson*, 656 N.Y.S.2d 765, 767 (N.Y. App. 1997) (911 caller lied in order to get the police to respond more quickly to her home); *Keller v. State*, 431 S.E.2d 411, 411-12 (Ga. App. 1993) (false report of robbery both in a 911 call and to responding police officers); *see also* Friedman & McCormack, 150 U. Pa. L. Rev. at 1197 (describing phenomenon in domestic violence cases of "the race to the phone by abusers who have been through the system and who know that they will be in a much better position if they are the first to call" the police for assistance).

even if counsel could present other extrinsic evidence that undermined or mitigated the accuser's statement, this cannot substitute for the one challenge that is unavailable—eliciting such favorable evidence from the accuser him or herself. Pursuant to *amici's* rule, however, the defendant is given the opportunity to challenge precisely those statements that will be most critical to the trier-of-fact's determination of guilt—accusatory statements by people who purport to be percipient witnesses, made to known government agents.

*Amici's* categorical rule eradicates the vestiges of *Ohio v. Roberts* not only by protecting the full scope and purpose of the confrontation guarantee, but also by establishing an efficient, easily administered rule that clearly defines for courts and counsel alike when confrontation is required. Post-*Crawford*, some lower courts have relied on "fact determinative case-by-case analys[e]s," reminiscent of *Ohio v. Roberts*, to determine what is "testimonial." *See* Baugh, 38 Loy. L.A. L. Rev. at 1866-69 (defending this mode of analysis even though it has led to contradictory holdings); *Amici's* Brief in support of *Davis* Petition for a Writ of Certiorari, at 15-17 nn.10-16 (documenting the complex, multi-variable fact-finding by lower courts in their efforts to identify "testimonial" statements); *see also Crawford*, 451 U.S. 61, 63 (criticizing the unpredictability of the amorphous *Ohio v. Roberts* reliability test). This method needlessly expends judicial resources, leads to inconsistent results, and makes it very difficult for practitioners to predict when confrontation is required. *Id.* at 67-68 ("By replacing categorical constitutional guarantees with open-ended balancing tests, we do violence to their design").

Pursuant to *amici's* simple, categorical rule, massive judicial resources are not devoted to what should be easily-identifiable heartland testimonial statements, and practitioners are given clear notice. Upon a simple determination that a statement is (1) accusatory and (2) made to known government agents, the need for confrontation is established. Thus time and energy are preserved, confusion is avoided, and the

right to confrontation is more fully protected by treating a whole group of heartland "testimonial" statements as such.

### C. *Amici's* Rule Negates Any Perverse Incentives For Law Enforcement To Divert Its Energy From Investigation To The Creation of "Unconfrontable" Statements.

In destroying the vestiges of *Ohio v. Roberts*, *amici's* categorical rule also negates the perverse incentives for law enforcement that have arisen in the wake of some courts' post-*Crawford* willingness to admit unconfronted "excited" accusations to government agents in "preliminary" investigations. Exempting such statements from confrontation presumes that police officers are not already wearing their crime-fighter's hats when they arrive at a crime scene and that they are neutral for some "preliminary" period of time. But as *Crawford* recognizes, and as real world experience confirms, this is a fiction; there are no "neutral" government investigators. 541 U.S. at 66. The police are always, as they should be,[11] poised to collect evidence and pass it on for prosecutorial use. By denying this reality and interpreting the confrontation guarantee through a fictional lens of police neutrality, decisions like *Hammon* and *Davis* predictably motivate the government to modify the way it pursues its investigations and to create protocols for the police that

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[11] To be clear, *amici* support thorough police investigation; *amici* oppose, however, the attempt to circumvent in-court confrontation by using the fruits of this investigation as a substitute for in-court testimony. *See* Brooks Holland, *Testimonial Statements Under* Crawford: *What Makes Testimonial Statements Testimonial?* 71 Brook. L. Rev. 281, 293 (2005) (explaining that the governmental "abuse" *Crawford* seeks to prevent does not occur at the time of evidence collection, but "when the prosecution usurp[s] the fact-finding process at trial . . . by presenting an unchallengeable narrative that already ha[s] shaped and guided the fact-finding process leading to trial and, certainly w[ill] at trial as well").

encourage hasty, cursory examinations so as to shield accusations from the adversarial scrutiny.

If decisions like *Hammon* and *Davis* are allowed to stand, protocols like the "Sample *Crawford* Predicate Questions" published by the American Prosecutor's Research Institute—the research wing of the National District Attorneys Association—are only a harbinger of what is to come. These questions were drafted precisely for the purpose of enlisting the assistance of police to "overcome a challenge to the introduction of . . . excited utterance statements. . . made by a victim . . . to a police officer." *See* Cindy Dyer, *Sample* Crawford *Predicate Questions*, 1 The Voice 8-9 (Nov. 2004) (http://www.ndaa-apri.org/pdf/the_voice_vol_1_issue_1.pdf). The questions direct police:

(1) to establish the "excited" demeanor of the declarant, ("Describe the victim's emotional condition," "What did you observe that led you to believe she was upset or excited? (E.g., trembling, shaking, crying, looking over shoulder, talking fast, breathless, etc.)");

(2) to preserve the informality of the statement, ("Describe the circumstances under which she made these statements (E.g., she was standing in the yard or in her living room, middle of the night, wearing her nightgown . . . .)," "Did you Mirandize her," "Were the statements sworn"); and

(3) to avoid the appearance that the statements were the product of "interrogation," ("Were the statements taken during 'the course of an interrogation,'" "did the victim make any statements to you that were not in response to any questions," and, if questions were asked, "what was the purpose of your questions," and "were your questions to her an interrogation or merely part of your initial investigation");

*see also* Wendy N. Davis, *Hearsay, Gone tomorrow?* 90 ABA Journal 22, 24 (Sept. 2004) (After *Crawford* was

announced, prosecutors offices "immediate[ly]" began "instructing officers to take notes of the victim's demeanor at the scene . . . to prove that the statement was an excited utterance and not the product of interrogation").

Under the *Hammon/Davis* paradigm, trials would effectively be shifted from the courtroom to the crime scene, and police officers would assume the role of prosecutor, judge, and jury. The success of a growing number of prosecutions would hinge on the conduct of the police during their "preliminary" investigation and their ability to characterize statements made in this timeframe as "excited" or "spontaneous." The police would have to quickly decide who at the crime scene is telling the truth, and then would have to make sure that they do not do or say anything—*e.g.*, calm a witness down to get a more coherent story, ask follow-up questions, or probe inconsistencies or gaps in a witness' story—that are sound investigative practices but that might preclude the admission of the witness' unconfronted statements at trial.

Thus if *Hammon* and *Davis* are allowed to stand, the Court can expect to see many more cases like *Jimenez v. State*, 2004 WL 1832719 (Cal. App. Aug. 17, 2004), *cert. denied, Jimenez v. California*, 125 S. Ct. 1713 (2005). Mr. Jimenez was tried while *Ohio v. Roberts* was still the law but his conviction for robbery was affirmed under *Crawford* by the California appellate court. This conviction rested on the account of an accuser (a man dressed as a woman) whom police had encountered by happenstance in a part of Los Angeles known for prostitution. *Id.* at *2. Upon seeing police, the accuser announced that he had been robbed. The accuser subsequently identified Mr. Jimenez as one of the culprits, provided the police with a false name, address, and phone number, and was never heard from again by the judicial system. *Id.* at *2, 8, 9. Despite the suspicious circumstances of the accusations, the accuser's disappearance, and his demonstrable false statements to police, the

government pressed forward with the charges in a trial where the sole testimony implicating Mr. Jimenez in this crime consisted of police officers recounting the "excited" criminal accusations of the anonymous accuser. *Id.* at *8-9.

Mr. Jimenez's trial thus provided him with no opportunity to question his accuser about why he had provided police with false identifying information, whether his accusation had been prompted by a desire to divert police attention from his own illegal activities, and whether he had been in any real position to make a positive, reliable identification of Mr. Jimenez as a culprit in any robbery. As a consequence of Mr. Jimenez's inability to question the accuser, the jury was presented with a woefully incomplete view of the evidence. None of this troubled the appellate court, which upheld Mr. Jimenez's conviction while acknowledging the trial court's assessment that the accuser had likely given the police false identifying information *precisely* to avoid being called as a witness and being impeached. *Id.* at *9. Apparently, it was enough that the police investigating the case had deemed this anonymous accuser to be a credible complainant.

A rule where the police are responsible for, in effect, trying cases at the scene of the crime will only distract the police from doing their real job. Police have an important role to play in the criminal justice process—fully investigating reports of crime and gathering the information needed for the prosecution of these crimes. It is asking too much of law enforcement officers also to demand that they alter their investigative techniques, *not* so as to get the most probative evidence for the prosecution, but so as to get the most "unconfrontable" evidence—*i.e.*, evidence that will assist the prosecution to subvert the adversarial process at trial. It is simply not the function of the Confrontation Clause to give the police "leeway to carefully assess the scene" or impact in any way a determination by the police "whether the victim needs immediate protection." *But see* Leonard Post, *All Eyes*

*Are On The High Court Over* 'Crawford' *Issues*, Nat'l L. J. (Oct. 27, 2005) (http://www.law.com/jsp/article.jsp?id=1130332860463) (Indiana Solicitor General argues that Confrontation Clause should be interpreted in this fashion). The Confrontation Clause is supposed to be a trial right, not an extra rule of police investigative procedure.

*Amici's* categorical rule would ensure that this burden is not imposed on police. Under a rule that requires subjecting all accusatory statements to known government agents to adversarial scrutiny in the courtroom, the police will know that they cannot affect whether the defendant is permitted to confront at trial the witnesses they interview at the scene. The police will then remain free to conduct a full investigation without any concern about how the case is later prosecuted. This, and not a rule that exempts from confrontation statements that can be characterized as the products of "preliminary" examination or "excited" utterances, is the only way to ensure that the Confrontation Clause does not in any way impede police investigation or efforts to assure witness safety.

### D. *Amici's* Rule Will Withstand The Ever-Present Pressure From The Government To Curtail Confrontation, Thus Providing Effective Protection Against Future Confrontation Abuses.

It is part of the natural dynamic of our adversarial system that the government will always seek to evade confrontation when given license to do so. Confrontation always has real dangers for the government because a testifying witness might, while on the stand and subject to cross-examination, provide additional details that muddle a previously clear account, reveal bias, or materially diverge from or even disavow the out-of-court statement. *See, e.g.*, Luisa Bigornia, *Alternatives to Traditional Prosecution of Spousal Abuse*, 11 J. Contemp. Legal Issues 57, 59 (2000) (San Diego prosecutor acknowledges "prosecution may be more successful

without the victim" because victim may appear "less credible" to the jury on the stand). It is generally the safer and easier course to present the jury with a pristine out-of-court statement containing the critical information necessary to sustain a prosecution. This method requires no civilian witness preparation; the government can be confident that the statement will not change or be contradicted; and it is unlikely that any hidden biases of the witness will be revealed at trial.

Apart from its other failings, *see supra*, a great weakness of *Ohio v. Roberts* was that it could not withstand the natural, ever-present pressure from the government to curtail the right to confrontation and shield its witnesses from the rigors of the adversarial system. Indeed, *Ohio v. Roberts* set up a test for confrontation that was particularly susceptible to these pressures. The amorphous "reliability" standard left an enormous amount of unbounded discretion to trial courts whose natural confidence in their ability to distinguish unreliable from reliable evidence rendered this analysis susceptible to broad expansion. Likewise, *Ohio v. Roberts*' directive that hearsay exceptions should be used as a proxy for assessing reliability failed to provide any real limits—these hearsay exceptions were malleable and could easily be manipulated to encompass whatever evidence was necessary to the prosecution's case.

Expansive, ad hoc judicial determinations of reliability—either under a hearsay exception or under a subjective determination by the court that there were particularized guarantees of trustworthiness—gave the government broad leeway to make strategic decisions to use out-of-court statements in lieu of live witness testimony whenever it saw fit to do so, including cases where the witness might prove uncooperative or be subjected to a difficult cross-examination. In other words, the government could avoid confrontation in cases where the witness' presence on the stand would have been

more harmful than helpful to the government's case.[12] *See, e.g.*, Corsilles, 63 Fordham L. Rev. at 860 (In San Diego prosecutor's office in 1990's, policy was not to compel presence of reluctant witnesses if prosecution had 911 tape or other evidence to establish guilt).

The categorical rule that *amici* seek is immune to the pressures that, in our adversarial system, the government will always bring to bear against the right of confrontation. The rule establishes unambiguous, firm boundaries for a core group of testimonial statements—accusatory statements to known government agents. In so doing, it provides clear guidelines both for trial courts to follow when assessing the need for confrontation and for appellate courts to apply when reviewing whether the right to confrontation was satisfied.

Moreover, *amici's* rule completely decouples the right to confrontation from malleable hearsay rules. There is no focus on the absent accuser's emotional state or motivations, or the timing of the accuser's statements—considerations that courts relied on under *Ohio v. Roberts* to determine if an out-of-court statement was admissible pursuant to a hearsay exception and considerations that some courts have found equally relevant post-*Crawford*. Rather, the accusatory nature of the statement and the identity of the listener as a known government agent—two easily identifiable factors—trigger the right to confrontation.

The government will continue to push against the confrontation right, as is natural in our adversarial system. But with a clear, firm rule in place, the right to confrontation will

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[12] Defense counsel had little recourse in the face of these tactics, because the prosecution could easily prevent the defense from calling the accuser as a witness by raising the specter of perjury charges. *See Jones v. United States*, 829 A.2d 464, 467 (D.C. 2003) (Schwelb, J. concurring) (noting that this practice is "apparently routine" in the District of Columbia).

be protected whenever the government seeks to introduce accusatory statements that are made to known government agents—*i.e.*, statements that lie at the core of the confrontation guarantee.

### E. *Amici's* Rule Will Not Impede The Government From Obtaining Legitimate Convictions.

As reviewed above, the categorical rule *amici* seek has a number of benefits: (1) it best reflects the original purpose of the Confrontation Clause, revived by *Crawford*, to promote and preserve the adversarial mode of criminal trial, (2) it ensures confrontation for precisely those statements the government will rely upon most heavily, and hence the statements that the defendant will most need to challenge and the statements that the fact-finder will find most material to its assessment of guilt, (3) it establishes a clear rule that, in contrast to *Roberts* and many lower-court, post-*Crawford* analyses of "testimonial," is easily, efficiently, and predictably applied, (4) it negates any perverse incentives that encourage police to alter or abridge their investigative procedures to gather "unconfrontable" statements, and (5) it is immune to the ever-present pressure from the government to shield its witnesses from the rigors of the adversarial system.

Against these benefits, there is no compelling downside, at least no downside that would have mattered to the Framers. The general assertion that the government will have greater difficulty obtaining convictions if it is forced to produce its witnesses in court and allow them to be subjected to cross-examination cannot survive scrutiny. It assumes that the government is entitled to convictions in all of these cases, regardless of the procedures by which these convictions are obtained. It is indistinguishable from Justice Warburton's justification to Sir Walter Raleigh for refusing to allow him to confront Lord Cobham—namely that "many horse stealers should escape if they may not be condemned without witnesses." 1 Criminal Trials 421 (Jardine, ed. 1850). The

Framers clearly rejected this approach to criminal justice, as did this Court in *Crawford*. Our Constitution does not permit the government to "dispens[e] with a jury trial because the defendant is obviously guilty." *Crawford*, 541 U.S at 62. Rather, the only way the government may legitimately establish guilt and obtain a conviction is to subject its case to adversarial testing in open court before the defendant and the trier-of-fact.

Likewise, the specific argument that domestic violence cases are different—that the adversarial mode of criminal trials should be dispensed with in this special context because of the high rate of complainants who refuse to cooperate with the prosecution—fails. To begin with, the argument cannot be cabined. If there is any lesson to be learned from the past abuses of the confrontation right, it is that exemptions from the adversarial system have a tendency to expand well beyond their original, intended boundaries. Under *Ohio v. Roberts*, the willingness to dispense with confrontation was evident in every sort of case, no matter the seriousness of the charge or the paucity of other evidence.[13] There is no reason to believe that a "necessity" exception solely for domestic

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[13] For example, trials without meaningful confrontation were conducted in prosecutions for murder, *State v. Siler*, 2003 WL 22429053 (Ohio App. 2003), *cert. granted and judgment vacated in light of Crawford v. Washington by Siler v. Ohio*, 125 S. Ct. 671 (2004) (No. 04-6765); *Garrett v. State*, 1999 WL 542577 (Tex. App. 1999); criminally negligent homicide, *State v. Kester*, 2001 WL 884155 (Del. Super. Ct. July 31, 2001); robbery, *Jimenez v. State*, 2004 WL 1832719; *State v. Alvarez*, 107 P.3d 350 (Ariz. App. 2005), *review granted in part* (Nov. 29, 2005); sexual assault, *State v. King*, 121 P.3d 234 (Colo. App.), *cert. denied*, 2005 WL 3073374 (Colo. Oct. 17, 2005); burglary, *State v. Anderson*, 2005 WL 171441 (Tenn. App.), *appeal granted* (June 20, 2005); arson, *State v. Ballos*, 602 N.W.2d 117 (Wis. App. 1999); carjacking, *People v. Herrera*, 2005 WL 2249772 (Cal. App.), *review denied*, (Nov. 30, 2005); possession of fire arm, *United States v. Joy*, 192 F.3d 761 (7th Cir. 1999), *Lopez v. State*, 888 So.2d 693 (Fla. App. 2004).

violence cases would be more rigorously enforced. There are any number of individual cases outside of the domestic violence context where the government encounters witnesses who may be unwilling to come to court because of asserted or inferred concerns about intimidation, coercion, and safety. And yet in those cases the government proceeds, using protective orders and other witness protection mechanisms that are equally available in the domestic violence context. If an exception based on the inherent difficulties of bringing witnesses to court is carved out for domestic violence cases, it would invariably expand—as confrontation abuses have a documented tendency to do—to encompass these cases as well.[14]

More importantly, the premise of this argument—that domestic violence cases cannot be prosecuted unless the confrontation guarantee is discarded—is fundamentally flawed. State governments became dependent on witnessless prosecutions in domestic violence cases, not because it was the only way to try these cases, but because it was an *easier* way that was perfectly legitimate under *Ohio v. Roberts'* non-adversarial mode of conducting criminal trials. This approach relied heavily on any accusations made to a responding police officer or 911 operator that could be characterized as excited utterances.[15] Indeed, with the expectation that the accusers in

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[14] Nor would there be any insurance against the expansion of this exception to excuse witness absenteeism for other causes: *e.g.*, lack of interest, fear of or aversion to the police, job commitments, and, last but not least, the desire to avoid committing perjury by adhering in court to earlier false statements provided to police.

[15] *See, e.g.*, American Prosecutor's Research Institute, *Creative Prosecution* (www.ndaa-apri.org/apri/programs/vawa/creative_prosecution.html) ("Prosecutors all over the country are learning ways to go forward on domestic violence cases without the cooperation of the victim"; advocating an "evidence-based prosecution" using 911 tapes and "exceptions to the hearsay rule," including "excited utterances" and "present sense impressions"); American Prosecutor's Research Institute, *Non-Participating Vic-*

these cases might never come to court and that such evidence might serve as the sole foundation for the prosecution's case under the *Ohio v. Roberts* regime, police officers were trained to "recognize" and record "excited" utterances by people reporting incidences of domestic abuse.[16]

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*tim* (www.ndaa-apri.org/apri/programs/vawa/nonparticipating_victim.html) (advocating prosecution of domestic violence cases by looking for excited utterances which not only "establish the elements of the crime . . . [but] also serve to breath[e] life into an otherwise faceless victim"); Andrew King-Ries, *The End of Victimless Prosecution?*, 28 Seattle U. L. Rev. 301, 301 (2005) ("Since the mid-1990's, prosecutors have pursued 'victimless' prosecutions' . . . . based largely on the admission of hearsay statements that a victim makes to 911 operators, police officers" or other first responders); Kenneth L. Wainstein, Comment, Legal Times, Dec. 20 2004 (acknowledgement by United States Attorney for the District of Columbia that, as soon as "innovative prosecutors . . . realized that the rules of evidence permitted prosecution without the [domestic violence] victim's cooperation, through the use of the victim's 'excited utterances' made on a 911 call or to the police," prosecutors began to routinely seek convictions based solely or primarily on such accusatory out-of-court statements).

[16] *See, e.g., People v. Ruiz*, 2004 WL 2383676, *9 (Cal. App. Oct. 26, 2004), *review granted*, (Jan. 19, 2005) (acknowledging that Californian police "officers have been trained to be vigilant in recording complete statements of the encounters and to record the witnesses' statements in their reports so that the statements may later support a victimless prosecution"); *see also Responding to Domestic Violence, Model Policy Number Two for Florida Law Enforcement* (Nov. 1999) (training police officers to recognize excited utterances and other hearsay exceptions so that they know which statements that they take at the scene will make it into evidence at a criminal trial); Denver Domestic Violence Task Force, *Domestic Violence Policy Manual* (Jan. 1999) (directing officers to take statements from parties and nonvictim witnesses and to make sure to record demeanor); Metropolitan Police Department, District of Columbia, *General Order 304.11 for Intrafamily Offenses* (Jan. 1998) (directing officers to document all information gathered at the scene in an event report and specifically directing officers to "note and document the victim's condition and demeanor"); New York State Office for the Prevention of Domestic Violence, *Observations, Statement and Reports: A Law Enforcement Checklist* (describing the purpose of the checklist "to aid in evidence gathering and to ensure that essential information is obtained at

In the wake of *Crawford*, the "hearsay exceptions and courtroom procedures designed during the [*Ohio v.*] *Roberts* era to conform to then-existing constitutional interpretations are suddenly misaligned with the new constitutional terrain." Tom Lininger, *Prosecuting Batterers After* Crawford, 91 Va. L. Rev. 747, 768 (2005). But this is not a legitimate argument for preserving in domestic violence cases the nonadversarial mode of criminal trials that arose under *Ohio v. Roberts*. To the contrary, it is clear evidence that state procedures need to be reformed to work effectively within the adversarial model rather than seeking to escape it. *See id.* at 818-19 (arguing that there are two ways to conduct domestic violence prosecutions in the wake of *Crawford*: "[O]ne is to engage in the intellectually dishonest exercise of labeling most statements by victims to police as 'nontestimonial'" and the other is to embrace evidentiary and procedural reform).

As in all criminal cases, one of the most effective ways to reduce witness absenteeism and recantation rates is to provide witnesses with better support systems. Of course, it requires more work to keep a witness informed about the progress of the case, prepare the witness to testify, and to provide the witness with supporting services. But such mechanisms are a proven, time-honored way of ensuring that even reluctant witnesses remain cooperative. *See* Krischer, 38 Prosecutor at 47-48 ("A properly supported victim, connected to services and counseling, is more likely to be cooperative than not, and a cooperative victim, willing and able to testify, makes *Crawford* a moot point."); Gwinn, Notice at 5 (suggesting "*Crawford* should push more communities toward greater comprehensiveness in services for victims" because when victims are provided with a network of support and advocacy services, they are less likely to drop charges or recant);

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the time of a preliminary investigation," and directing police to "record any spontaneous statements made by the victim," "describe the victim's emotional condition," and "if possible [to] tape record statements").

Lininger, 91 Va. L. Rev. at 815 ("Relocation of victims to shelters or hotels at the government's expense is another option that deserves more attention in domestic violence cases," and "legislatures should provide adequate funding for victim's advocates . . . who give support to victims, inform them of resources for their protection and monitor the defendants' compliance with pre-trial orders").

In addition to improved witness support, commentators have suggested a variety of potential avenues for reform to be explored by the states in the wake of *Crawford*, including (1) expanding hearsay rules so that, if a witness does take the stand and diverges from her initial account of abuse, prior out-of-court statements can be more liberally admitted for their truth, *see* Lininger, 91 Va. L. Rev. at 797-811; and (2) liberalizing the admission of expert testimony to explain why domestic violence victims might testify reluctantly or inconsistently with prior accusatory statements, *id.* at 812-13.

The point is not for this Court to suggest a comprehensive list of mechanisms the states could use to encourage witnesses to come to court and provide their testimony in a trial that fully comports with the confrontation guarantee. The point is merely to illustrate that such mechanisms exist, and that, even if the nonadversarial system for prosecuting domestic violence cases that arose under *Ohio v. Roberts* is closed off to them, state officials will still be able to set up a workable system of domestic violence prosecutions that conforms to the dictates of the Constitution.

## CONCLUSION

For the reasons set forth above, this Court should declare that all accusatory statements to known government agents are testimonial and, applying this categorical rule, should reverse Mr. Hammon's conviction.

Respectfully submitted,

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Nos. 05-5224 and 05-5705

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# Supreme Court of the United States

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**HERSHEL HAMMON,**

*Petitioner,*

*- v. -*

**INDIANA,**

*Respondent.*

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**ADRIAN MARTELL DAVIS,**

*Petitioner,*

*- v. -*

**WASHINGTON,**

*Respondent.*

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ON WRITS OF CERTIORARI TO THE SUPREME COURTS OF INDIANA AND WASHINGTON

## BRIEF OF *AMICUS CURIAE* THE NATIONAL DISTRICT ATTORNEYS ASSOCIATION IN SUPPORT OF RESPONDENTS

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## TABLE OF CONTENTS

Page

**TABLE OF AUTHORITIES** ..... ii

**INTEREST OF THE *AMICUS CURIAE*** ..... 1

**SUMMARY OF ARGUMENT** ..... 3

**ARGUMENT** ..... 5

**Part One: Supreme Court Pronouncements Regarding the Core Confrontation Right and its Relationship to the Hearsay Rule** ..... 5

**Part Two: The Supreme Court Returns to the Core Principles of the Confrontation Clause in Crawford v. Washington** ..... 14

**Part Three: The Statements in the Present Cases are not "Testimonial," and Due Process should be the Ultimate Test of the Propriety of their Introduction at Trial** ..... 25

**CONCLUSION** ..... 29

## TABLE OF AUTHORITIES

### FEDERAL CASES


Barber v. Page, 390 U.S. 719 (1968) ..... 10

Berger v. California, 393 U.S. 314 (1969) ..... 10

Brookhart v. Janis, 384 U.S. 1 (1966) ..... 10

Bruton v. United States, 391 U.S. 123 (1968) ..... 10

California v. Green, 399 U.S. 149 (1970) ..... 9, 10

Chambers v. Mississippi, 410 U.S. 284 (1973) ..... 27

Crawford v. Washington, 541 U.S. 36 (2004) ..... passim

Delaney v. United States, 263 U.S. 586 (1924) ..... 11

Douglas v. Alabama, 380 U.S. 415 (1965) ..... 10

Dowdell v. United States, 221 U.S. 325 (1911) ..... 7, 8

Dutton v. Evans, 400 U.S. 74 (1970) ..... 9, 10, 11

Estelle v. McGuire, 502 U.S. 62 (1991) ..... 27

Idaho v. Wright, 497 U.S. 805 (1990) ..... 12, 13

Kirby v. United States, 174 U.S. 47 (1899) ..... 7

Lee v. Illinois, 476 U.S. 530 (1986) ..... 12

Lilly v. Virginia, 527 U.S. 116 (1999) ..... 12, 13, 14

Mancusi v. Stubbs, 408 U.S. 204 (1972) .....10

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Motes v. United States, 178 U.S. 458 (1900) .....7

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Pointer v. Texas, 380 U.S. 400 (1965).....6, 9, 10

Reynolds v. United States, 98 U.S. 145 (1878) .....6, 7

Roberts v. Russell, 392 U.S. 293 (1968).....10

Snyder v. Massachusetts, 291 U.S. 97 (1934) .....7, 8

Spencer v. Texas, 385 U.S. 554 (1967) .....28

United States v. Inadi, 475 U.S. 387 (1986).....12, 13

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**STATE CASES**

People v. Orpin, 8 Misc. 3d 768,
796 N.Y.S.2d 512 (Justice Court, Town of
Irondequoit, Monroe Co. 2005) .....24

People v. Niene, 8 Misc. 3d 649, 798 N.Y.S.2d 891
(Crim. Ct. N.Y. Co. 2005) .....24

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Wright & Graham, Federal Practice and Procedure: Evidence (1997) ..... 15

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**On Writs of Certiorari to the Supreme Courts of Indiana and Washington**

# BRIEF OF *AMICUS CURIAE* NATIONAL DISTRICT ATTORNEYS ASSOCIATION IN SUPPORT OF RESPONDENTS

## INTEREST OF THE *AMICUS CURIAE*

The National District Attorneys Association ("NDAA")[1] is a nonprofit corporation and the sole national

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[1] Accompanying this brief are letters of consent to its filing. No counsel for any party authored any part of this brief, and no person or entity, other than amicus, has made a monetary contribution to the preparation or submission of this brief.

membership organization representing local prosecuting attorneys in the United States. Since its founding in 1950, NDAA's programs of education and training, publications, and *amicus curiae* activity have carried out its guiding purpose of serving as "the Voice of America's Prosecutors and To Support Their Efforts to Protect the Rights and Safety of the People."

The NDAA and its members have a compelling interest in the outcome of these appeals because of the severe damage a reversal in either case could do daily in innumerable prosecutions in courthouses across this nation. Put simply, the positions advanced by petitioners would have an enormous and negative impact on the ability of prosecutors to do their jobs, and of the courts to do justice. As the facts in Hammon and Davis show, great harm would be done in domestic violence prosecutions, in which victims frequently will not appear in court. Should informal statements taken in the immediate wake of attacks on domestic violence victims be excluded, as petitioners ask, juries would never hear the reports which, very often, are the most trustworthy proof of serious crimes.

And the damage would by no means be limited to domestic violence cases. Elderly victims, children, and the socially powerless frequently are unable or unwilling to appear in court. A rule disallowing statements that traditionally have been admissible under hearsay exceptions such as the one for excited utterances would offer a free pass to many of those who prey on such victims. Nor are cases involving vulnerable victims the only ones at stake. For centuries the courts have admitted hearsay in all kinds of criminal cases, on behalf of the prosecution and the defense, because the wisdom of the

common law has demonstrated that hearsay exceptions promote just results.

Critically, there is no constitutional justification for the harmful results that petitioners seek. The Confrontation Clause was designed to preclude "trial by affidavit." A trial by affidavit is one in which the prosecution makes its case with a declaration (1) created in a formal out-of-court examination, by a government agent, (2) of a declarant aware that the statement was intended for use at a trial. NDAA asks this Court to return to this understanding of the Confrontation Clause and make clear that, subject to due process limitations, states are free to regulate the admissibility of non-testimonial hearsay statements.

## SUMMARY OF ARGUMENT

The present cases require this Court to determine whether the statements at issue are "testimonial" hearsay barred by the Confrontation Clause of the Sixth Amendment. The petitioners in Hammon v. Indiana and Davis v. Washington both take a wrong turn in analyzing the meaning of "testimonial." In that regard, petitioner Davis incorrectly posits that the Confrontation Clause forbids the admission of any hearsay that does not fall within a hearsay exception recognized before 1791 (see Davis Brief: 11-12, 22-34).[2] This Court has never -- including in Crawford v. Washington – suggested that the Confrontation Clause froze hearsay law in 1791.

[2] The brief of petitioner Hammon sometimes appears to endorse that position as well (see Hammon Brief: 22, 28).

Petitioner Hammon puts forward an equally flawed theory, finding "testimonial" any statement that transmits to a known public official "information for use in investigation or prosecution of crime" (Hammon Brief: 13). In Hammon's view, it makes no difference whether the officer or the declarant intended that the information would be used at a trial; nor does it matter why the information was transmitted or whether the officer was involved in preparing a case for trial (see Hammon Brief: 7, 10, 12-14, 18, 20-21, 41). In fact, Hammon would extend the meaning of "testimonial" to include many statements made to civilians (see id. at 11, 15 n. 11, 17). This expansive view of the Confrontation Clause ignores the Framers' view: the clause was designed to serve the limited purpose of protecting against the common-law evil of "trial by affidavit."

As a review of this Court's decisions makes plain, the Confrontation Clause bars prosecutors from collecting formalized statements from witnesses and then using those statements at trial, without affording the defendant an opportunity for cross-examination. Beyond that core purpose, the Founders left the states free to develop hearsay exceptions, just as they are free to develop other aspects of evidentiary law and criminal procedure, in a manner consistent with due process. Otherwise, the Confrontation Clause will become a meta-hearsay rule imposed, unjustifiably, upon the states by the federal courts.

The argument of amicus NDAA consists of three parts. Part One examines the historical pronouncements of this Court to demonstrate that the Framers intended that the Confrontation Clause serve a limited purpose and did not seek to freeze hearsay law in 1791. Part Two discusses this Court's recent decision in Crawford v. Washington, 541

U.S. 36 (2004), which focused its analysis on the core purpose of the clause and rejected the view that virtually all hearsay is subject to Sixth Amendment scrutiny. Specifically, as Crawford explained, the Confrontation Clause imposes close constitutional scrutiny only on "testimonial" hearsay – that is, formal statements of witnesses created for use at trial, or their close equivalents. Part Three addresses the regulations, apart from the Confrontation Clause, which govern non-testimonial hearsay.

## ARGUMENT

### Part One: Supreme Court Pronouncements Regarding the Core Confrontation Right and its Relationship to the Hearsay Rule

#### A. The Text of the Confrontation Clause

The Sixth Amendment provides, in pertinent part, that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him" (emphasis added). It is undisputed that this clause permits a criminal defendant to confront and cross-examine any witness who gives live testimony at trial. However, from the text alone, it is not clear whether the clause bars the prosecution from introducing hearsay statements of declarants who do not appear at trial. As this Court noted in Crawford, "witnesses against" could be understood to mean only "those who actually testify at trial." Crawford, 541 U.S. at 42-43. If that definition were adopted, a hearsay declarant would not qualify as a "witness" within the meaning of the Confrontation Clause, just as a hearsay declarant is not ordinarily considered a "witness" within the

meaning of the compulsory process clause of the Sixth Amendment or the self-incrimination clause of the Fifth Amendment. See Amar, Confrontation Clause First Principles: A Reply to Professor Friedman, 86 Geo. L.J. 1045, 1047 (1998). Alternatively, "witnesses against" could be interpreted to mean "those whose statements are offered at trial," which would encompass all hearsay declarants. See Crawford, 541 U.S. at 43. Or, perhaps, the solution is "something in-between." Id.

**B. Supreme Court Interpretations of the Confrontation Clause Prior To Ohio v. Roberts**

The Confrontation Clause was not held applicable to the states until 1965. See Pointer v. Texas, 380 U.S. 400 (1965). In this Court's earlier decisions, few controversies arose regarding the Sixth Amendment right of confrontation, and the clause had little impact on the conduct of criminal trials. In fact, this Court did not consider whether the Confrontation Clause might bar admission of out-of-court statements at criminal trials until Reynolds v. United States, 98 U.S. 145 (1878), which was decided nearly 90 years after the adoption of the Bill of Rights.[3] And, when faced with that question, this Court adopted a circumscribed view that the confrontation right was grounded in its history and was a response to grave abuses that occurred at common law.

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[3] In Reynolds, this Court upheld the admission of an unavailable witness's prior testimony, because the defendant had an opportunity to cross-examine the witness at the prior trial and, also, the defendant was responsible for the witness's failure to appear. See id. at 159-61.

In particular, this Court's earliest decisions reveal that the "primary object" of the provision was "to prevent depositions or ex parte affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness." Mattox v. United States, 156 U.S. 237, 242 (1895); see also Snyder v. Massachusetts, 291 U.S. 97, 107 (1934); Dowdell v. United States, 221 U.S. 325, 330 (1911). Consistent with that purpose, many of the early Confrontation Clause disputes involved efforts by the prosecution to introduce formalized documents or the prior sworn statements of nontestifying witnesses. See, e.g., Dowdell, 221 U.S. at 328-30 (certified record of prior court proceedings); Motes v. United States, 178 U.S. 458, 470-74 (1900) (testimony at a "preliminary trial"); Kirby v. United States, 174 U.S. 47, 49-50, 53-54 (1899) (guilty pleas of accomplices); Mattox, 156 U.S. at 240-43 (prior sworn testimony of deceased witness); Reynolds v. United States, 98 U.S. 145, 158-61 (1878) (testimony at prior trial).[4]

To be sure, this Court realized that the confrontation right might sometimes overlap with common law hearsay prohibitions. For instance, in Mattox, the Court discussed in dicta whether the Confrontation Clause barred admission

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[4] The admission of formalized statements does not necessarily constitute a violation of the Confrontation Clause if the defendant had a prior opportunity to confront and cross-examine the witness. See Mattox, 156 U.S. at 240-43 (no error in admission of former testimony of deceased witness, whom the defendant had cross-examined at a prior trial: "the right of cross-examination having once been exercised, it was no hardship upon the defendant to allow the testimony of the deceased witness to be read").

of dying declarations, concluding that such statements were admissible under a longstanding common-law exception. See Mattox, 156 U.S. at 243-44; see also Dowdell, 221 U.S. at 330.[5] But critically, not one of this Court's early cases held that the Confrontation Clause barred the admission of statements that lacked the formal trappings of affidavits, depositions, prior sworn testimony, or the like.

Further, in its early decisions, this Court refused to expand the confrontation right beyond its core if doing so would interfere with state court procedures and evidentiary rules. For instance, in Snyder v. Massachusetts, supra, 291 U.S. at 102-22, this Court (per Justice Cardozo) rejected the defendant's argument that the state court violated his confrontation rights by permitting the jury to view the crime scene in the defendant's absence. Assuming without deciding that the Fourteenth Amendment made the Confrontation Clause applicable to the states, see id. at 106, Justice Cardozo observed that a state court procedure "does not run foul of the Fourteenth Amendment because another method may seem to our thinking to be fairer or wiser or to give a surer promise of protection to the prisoner at the bar." Id. at 105. This Court explained that there had always been "recognized exceptions" to the "privilege of confrontation," such as dying declarations. Id. at 107. The Court added that the "exceptions are not even static, but may be enlarged from time to time if there is no material departure from the reason of the general rule." Id.

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[5] Similarly, the Court noted in Dowdell that the Confrontation Clause did not bar admission of documentary evidence used to prove collateral facts, because such evidence had been admissible at common law. See Dowdell, 221 U.S. at 330.

As noted, in 1965, Pointer held that the Confrontation Clause is applicable to the states. See Pointer, 380 U.S. at 403. After Pointer, this Court continued to make clear that the clause had not "constitutionalized" the general, common-law restrictions on hearsay. For instance, in California v. Green, 399 U.S. 149 (1970), this Court held that the defendant's confrontation rights were not violated by a California hearsay rule which, contravening the "orthodox" common law rule, allowed admission of prior inconsistent statements for their truth. See id. at 153-64. While noting that the Confrontation Clause and hearsay rules sometimes "protect similar values," this Court stated pointedly that the clause does not represent "a codification of the rules of hearsay and their exceptions as they existed historically at common law." Id. at 155. On the contrary, "merely because evidence is admitted in violation of a long-established hearsay rule does not lead to the automatic conclusion that confrontation rights have been denied." Id. at 156. Notably, in concurrence, Chief Justice Burger "emphasize[d] the importance of allowing the States to experiment and innovate." Id. at 171. Justice Harlan, too, observed that the Confrontation Clause protects against "flagrant abuses" and does not "ordain common law rules of evidence with constitutional sanction." Id. at 179.

In the same vein, this Court held in Dutton v. Evans, 400 U.S. 74 (1970), that the Confrontation Clause did not prevent Georgia from adopting a hearsay rule under which coconspirator statements were admitted more liberally than under federal law. This Court emphasized that the relatively limited federal hearsay exception was "a product, not of the Sixth Amendment," but of other policy concerns. Id. at 82. Moreover, the defendant's challenge to

the Georgia rule did not fall within the core of the confrontation right, because it did not involve, for instance, "a confession made in the coercive atmosphere of official interrogation" or a "wholesale denial of cross-examination." Id. at 87. Likewise, in concurrence, Justice Harlan observed that it was not the "core purpose" of the Confrontation Clause to "prevent overly broad exceptions to the hearsay rule," because "the clause is simply not well designed for taking into account the numerous factors that must be weighed in passing on the appropriateness of rules of evidence." Id. at 94, 96.

Underpinning the notion that the Confrontation Clause served a limited, core purpose, nearly all of this Court's confrontation cases from the era of Pointer, Dutton, and Green -- like the earlier cases from the Mattox era -- prohibited the introduction only of formal statements akin to affidavits or depositions, such as prior sworn testimony or confessions obtained as a result of police interrogation. See, e.g., Mancusi v. Stubbs, 408 U.S. 204, 213-16 (1972) (prior testimony); Green, 399 U.S. at 151-52 (preliminary hearing testimony and inculpatory statement to the police); Roberts v. Russell, 392 U.S. 293, 293-95 (1968) (codefendant's confession); Bruton v. United States, 391 U.S. 123, 126-28 and n. 3 (1968) (same); Berger v. California, 393 U.S. 314 (1969) (preliminary hearing testimony); Barber v. Page, 390 U.S. 719, 720-25 (1968) (same); Brookhart v. Janis, 384 U.S. 1, 4 (1966) (codefendant's confession); Douglas v. Alabama, 380 U.S. 415, 416-20 (1965) (same); Pointer, 380 U.S. at 401-08 (preliminary hearing testimony). In fact, prior to 1980, this Court heard hardly any cases in which defendants alleged that the admission of non-formalized hearsay statements violated their confrontation rights. And, when faced with such claims, this Court rejected them out of hand. See

Dutton, 400 U.S. at 76-90 (statement of coconspirator); Delaney v. United States, 263 U.S. 586, 590 (1924) (same).

### C. Ohio v. Roberts and the "Constitutionalization" of Hearsay Law

This Court charted a new course in Ohio v. Roberts, 448 U.S. 56 (1980), subjecting every hearsay statement admitted at a criminal trial to Confrontation Clause scrutiny. Notably, the contested evidence in Roberts -- a witness's sworn testimony at a preliminary hearing, see id. at 58-59 -- fell within the core class of statements to which the Confrontation Clause had always been applied. Hence, the Court in Roberts had no need to consider whether the Confrontation Clause applied to all hearsay. And notably, the Roberts Court expressed no desire to "map out a theory" of confrontation that "would determine the validity of all hearsay . . . exceptions." Id. at 64-65 (internal quotations omitted). Nevertheless, seeking a general standard to reconcile the Confrontation Clause and the hearsay rule, this Court held that the prosecution could not "normally" introduce the hearsay statement of a nontestifying declarant without first demonstrating the declarant's unavailability. Id. at 66. Even then, the statement was admissible only if it fell within a "firmly rooted" hearsay exception or bore other "particularized guarantees of trustworthiness." Id.[6]

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[6] In Roberts, the Court held that admission of the witness's preliminary hearing testimony did not violate the defendant's confrontation rights, because the hearing testimony bore sufficient indicia of reliability. See Roberts, 448 U.S. at 70-74. The Court eschewed a resolution more compatible with the traditional interpretation of the clause: that the defendant's (continued . . .)

Significantly, even while applying the far-reaching Roberts standard, this Court abided generally by the core principles of the Confrontation Clause. That is, the Court held formalized hearsay accusations, including statements made during police-arranged interrogations, inadmissible under the clause and permitted the admission of less-than-formal declarations. Compare Lilly v. Virginia, 527 U.S. 116, 120-21, 127-39 (1999) (holding that admission of accomplice's confession to the police, which incriminated defendant, violated defendant's confrontation rights); Idaho v. Wright, 497 U.S. 805 (1990) (state court violated defendant's confrontation rights by admitting statements made by child victim to pediatrician during examination of victim arranged by police and child welfare officials); and Lee v. Illinois, 476 U.S. 530, 546-47 (1986) (codefendant's confession to the police was improperly admitted at defendant's trial); with White v. Illinois, 502 U.S. 346, 348-58 (1992) (holding that the Confrontation Clause did not bar admission of excited statements made by the child victim to her babysitter, her mother, and a police officer who arrived on the scene); and United States v. Inadi, 475 U.S. 387, 388-400 (1986) (holding that the Confrontation Clause did not require the prosecutor to prove unavailability before introducing the statements of a nontestifying coconspirator).

Moreover, even while the Roberts standard prevailed, this Court acknowledged that the Confrontation Clause should not be viewed as a "general rule prohibiting

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confrontation rights were not violated because he had an opportunity to examine the witness at the preliminary hearing. See Crawford, 541 U.S. at 58; Roberts, 448 U.S. at 70.

the admission of hearsay statements." Wright, 497 U.S. at 814; see also White, 502 U.S. at 357 (declining to interpret the Confrontation Clause to work a "wholesale revision of the laws of evidence") (internal quotations omitted); Inadi, 475 U.S. at 392 ("Roberts itself disclaimed any intention of proposing a general answer to the many difficult questions arising out of the relationship between the Confrontation Clause and hearsay"); cf. Lilly, 527 U.S. at 137 (analogizing accomplice confession at issue to "the core concerns of the old ex parte affidavit practice").

The attempt of Roberts to "steer a middle course," White, 502 U.S. at 352 (quoting Roberts, 448 U.S. at 68 n. 9), ultimately failed. Almost from its inception, Justices and commentators criticized Roberts for abandoning a century of precedents regarding the core meaning of the Confrontation Clause. Concurring in White, Justice Thomas (joined by Justice Scalia) argued that the Roberts standard "complicated and confused the relationship between the constitutional right of confrontation and the hearsay rules of evidence" by assuming that "all hearsay declarants are 'witnesses against' a defendant within the meaning of the Clause" -- "an assumption that is neither warranted nor supported by the history or text" of the Sixth Amendment. White, 502 U.S. at 358-59 (Thomas, J., concurring) (emphasis in original). Justice Thomas advocated a return to the historical interpretation that "the Confrontation Clause is implicated by extrajudicial statements only insofar as they are contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions." Id. at 365; see also Lilly, 527 U.S. at 143-44 (Thomas, J., concurring).

Similarly, in Lilly, Justice Breyer argued that the effort to "tie the [Confrontation] Clause so directly to the

hearsay rule" was "of fairly recent vintage" and that the reliability standard of Roberts was "too narrow and too broad" when viewed in light of the "traditional purposes" of the clause. Lilly, 527 U.S. at 140-41 (Breyer, J., concurring). Specifically, Justice Breyer explained that the reliability rule was too broad, because it "would make a constitutional issue out of the admission of any relevant hearsay statement," even one "made long before the crime occurred and without relation to the prospect of a future trial." Id. at 142 (emphasis in original). In addition, the reliability rule was too narrow, because it would permit admission of "testimony" prepared out of court so long as it fell within a "well-recognized hearsay rule exception." Id. at 141. Justice Breyer also questioned the notion, implicit in the Roberts standard, that the Sixth Amendment inquiry should focus on the "trustworthiness" of the statement at issue. See id. at 142. Justice Breyer predicted that, in a future case, it might be necessary to "reexamine the current connection between the Confrontation Clause and the hearsay rule." Id.; see also Amar, Confrontation Clause First Principles, 86 Geo. L.J. at 1048-49; Friedman, Confrontation: The Search for Basic Principles, 86 Geo. L.J. 1011 (1998).

## Part Two: The Supreme Court Returns to the Core Principles of the Confrontation Clause in Crawford v. Washington

### A. Crawford Overrules Roberts and Restores the Understanding that the Confrontation Clause Is Aimed at Only a Limited Class of Hearsay.

In Crawford, supra, this Court rejected the Roberts analysis and returned to an understanding of the Confrontation Clause consistent with its jurisprudence for

the 100 years prior to Roberts. This Court held that Roberts had wrongly departed from the historical focus of the Confrontation Clause, which was to prevent the "use of ex parte examinations as evidence against the accused." Crawford, 541 U.S. at 50. This Court explained that the confrontation right was designed to redress flagrant abuses that occurred in civil-law practice and under the Marian statutes in 16th- and 17th-century England, and particularly during the treason trial of Sir Walter Raleigh. See id. at 43-47. A confrontation right restricting the prosecutorial use of ex parte examinations arose as a result. See id. at 45-47.

Further, the text of the Confrontation Clause, which guarantees an accused the right to confront the "witnesses" against him, Crawford, 541 U.S. at 51, demonstrates its focus. "Witnesses," this Court noted, are "those who 'bear testimony.'" Id. (quoting 1 N. Webster, An American Dictionary of the English Language (1828) (emphasis added)). Hence, the Confrontation Clause was designed to prevent "admission of testimonial statements of a witness who did not appear at trial." Id. at 53-54 (emphasis added).[7] The clause was not, as Roberts suggested, aimed at all hearsay. Id. at 51 ("not all hearsay implicates the Sixth Amendment's core concerns"). Crawford plainly stated that Roberts had reached too far in subjecting all hearsay to "close constitutional scrutiny." Crawford, 541 U.S. at 60; see also Wright & Graham, Federal Practice

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[7] Consistent with the confrontation right, the prosecution may introduce even a testimonial statement of a nontestifying witness if the witness is unavailable and the defendant had a prior opportunity to cross-examine him. See id. at 54; accord Mattox, 156 U.S. at 240-43.

and Procedure: Evidence §§ 6343, 6344, pp. 326-30, 345, 393-94 (1997).

Significantly, Crawford cited this Court's pre-Roberts precedents with approval, finding them "largely consistent" with the principles underlying the Confrontation Clause. See Crawford, 541 U.S. at 57. Crawford also approved the "outcomes," if not the reasoning, of this Court's decisions during the Roberts era, stating that the results "hew[ed] closely to the traditional line." Id. at 58.[8] The Crawford Court adopted a new standard not in order to overrule precedents, but to guide lower courts, which had received little meaningful direction from the "amorphous" Roberts reliability rule. See id. at 63-64. In short, Crawford admonished lower courts to enforce core confrontation principles strictly and, when faced with cases outside the core, to forestall the "constitutionalization" of ordinary hearsay rules.

All of this explodes the central theme of the brief of petitioner Davis. As noted, Davis' argument assumes that the Confrontation Clause is a "super" codification of all hearsay rules extant in 1791. Thus, according to Davis, if there was no hearsay exception for "excited utterances" in

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[8] This Court found possible "tension" in only one of the Roberts-era cases, White v. Illinois, supra, noting that the child victim's statement to the investigating officer in that case might not have been admissible under the historical understanding of the confrontation right. See id. at 58 n. 8. NDAA submits that, under a proper understanding of what hearsay is "testimonial," there is no "tension" at all; the victim's statement to the investigating officer was not testimonial, and thus was properly received. See Part Two (B) and Part Three, infra.

1791, the Confrontation Clause bars them. But, as explained in Crawford and in this Court's pre-Roberts decisions, the clause is aimed at only a limited class of hearsay statements: those which are "testimonial." Hence, the constitutional inquiry does not turn on whether excited utterances were admissible under a recognized hearsay exception in 1791 (or upon the adoption of the Fourteenth Amendment in 1868). Instead, the critical question is whether a particular utterance is "testimonial" within the meaning of the clause.[9]

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[9] Petitioner Davis would find support for his position in a footnote in Crawford which discusses dying declarations, 541 *U.S.* at 56 *n.* 6, but he misunderstands that footnote. In it, the Court notes that all dying declarations arguably are admissible, because an exception to the hearsay rule for dying declarations was recognized before 1791. Petitioner Davis believes that this amounts to an endorsement of his thesis that the Confrontation Clause allows the admission of hearsay only if an exception for such hearsay was recognized by 1791. See Davis Brief: 23; see also Hammon Brief: 29. But this Court did not by any means endorse petitioner's view. The Court simply stated that, because of the vintage of the dying declaration exception, even a testimonial dying declaration might be admissible. The Court did not state that all more-recently recognized hearsay exceptions are unconstitutional. Petitioner Hammon makes a similar mistake as to excited utterances. See Hammon Brief: 22-23.

**B. Crawford limits the class of "testimonial" statements to those akin to the ex parte affidavits used in Marian times.**

Petitioner Hammon's brief, and the amici submissions of defense groups and civil liberties organizations, appear generally to recognize that the Confrontation Clause applies only to "testimonial" hearsay. The flaw in these briefs is that they define testimonial hearsay far more broadly than is justified. According to the definitions proposed in these briefs, testimonial declarations include any "accusatory" statement, or any statement made by a person who reasonably would expect that the utterance will be of any use to law enforcement. See, e.g., Hammon Brief: 7-8, 41; Brief of NACDL: 3, 3-4, 5, 7-9, 14-17, 21, 23; ACLU Brief: 8, 14.[10] These tests have one thing in common: they find no basis in Crawford or earlier decisions of this Court.

As Crawford explained, the Roberts test had departed from "historical principles" by being "too broad," since it applied "the same mode of analysis" to all hearsay, whether or not it "consist[ed] of ex parte testimony." Crawford, 541 U.S. at 60. In addition, the Roberts test was "too narrow," because it allowed the admission of "ex parte testimony upon a mere finding of reliability." Id. Hence,

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[10] The latter two references are, more formally, to the brief submitted in the Hammon case by "The National Association of Criminal Defense Lawyers and the Public Defender Service for the District of Columbia" and to the brief submitted in both cases by "The American Civil Liberties Union, the ACLU of Washington and the Indiana Civil Liberties Union."

this Court adopted a new standard in Crawford, focused on ex parte "testimonial" statements, in order to return the Confrontation Clause to its proper concern. That is, this Court sought to remove "close constitutional scrutiny" from most hearsay while ensuring strict enforcement of the clause for "paradigmatic confrontation violations." See Crawford, 541 U.S. at 60.

In promulgating this standard, Crawford adopted a limited definition of "testimonial." "Testimony" means a "solemn declaration or affirmation made for the purpose of establishing or proving some fact." Crawford, 541 U.S. at 51 (quoting 1 N. Webster, An American Dictionary of the English Language (1828)). Hence, an "accuser who makes a formal statement to government officers" bears "testimony" within the meaning of the Confrontation Clause. Others, such as "a person who makes a casual remark to an acquaintance," do not. Crawford, 541 U.S. at 51. Therefore, at its core, the confrontation right is concerned with formal declarations such as "prior testimony at a preliminary hearing, before a grand jury, or at a former trial" -- and also "police interrogations" -- because those "are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed." Id. at 68.

In finding that these types of statements were testimonial, Crawford did not attempt to provide a precise definition of "testimonial" declarations. The Court did, however, identify three possible definitions of this core class of statements: (1) "ex parte in-court testimony or its functional equivalent – that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used

prosecutorially"; (2) "extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions"; and (3) "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." Id. at 51-52.

We submit that the first two definitions, which are quite similar, correctly suggest the boundaries of "testimonial" hearsay. Under both definitions, a "testimonial" declaration would be a statement (1) created in a formal, out-of-court examination by a government agent (2) of a declarant aware that the statement was intended for use at a trial. Both definitions are consistent with this Court's pre-Roberts interpretations of the Confrontation Clause, which make plain that the clause excludes only formal hearsay statements. In that regard, both definitions include only "solemn declarations or affirmations." And both encompass the examples of testimonial hearsay identified in Crawford. See Crawford, 541 U.S. at 68. Helpfully, these definitions likewise simplify the task of the lower courts. They moot any debate about whether subjective motives or understandings of the speaker, or the listener, control whether a statement is "testimonial." See, e.g., Hammon Brief: 14-21. And they effectively eliminate the need to engage in speculation about the mental states of unavailable declarants.

Simply put, when an affidavit is signed or a statement is taken in a formal setting, both the declarant and the interrogator are well aware that it can be used for trial. It is only when both the declarant and the interrogating official are aware that a statement is being

taken for possible use at trial that the statement is "testimonial."

The third possible definition of testimonial hearsay reported in Crawford is not supported by any of this Court's pre-Roberts holdings. But even that formulation is far narrower than the ones proposed by petitioner Hammon and the supporting amici. Petitioner Hammon insists that "testimonial" hearsay includes any statement that the declarant might reasonably expect to be used for any law enforcement purpose, and not just at trial (Hammon Brief: 12-13, 18). For example, petitioner would have it that a victim's spontaneous statement to a 911 operator that he needs aid because he has been shot is no different from a sworn deposition or prior trial testimony. Needless to say, petitioner cites no precedent from this Court in making that suggestion.

Alternatively, petitioner Hammon urges this Court to rule that "a statement made to a known police officer (or other government agent with significant law enforcement responsibilities) and accusing another person of a crime is testimonial within the meaning of Crawford" (Hammon Brief: 7, 10). He thus would remove from consideration whether either party to a statement anticipated its subsequent law enforcement use, and focuses only on whether the statement qualifies as an "accusation" – however an "accusation" might be defined. But petitioner Hammon weaves this test too from whole cloth, rather than any Confrontation Clause decision of this Court. Even the third possible definition of "testimonial" hearsay identified in Crawford suggests specifically that the declarant must believe that the statement would be used at the subsequent trial, and not that it simply is "accusatory." And petitioner Hammon's test would sweep into the "testimonial" category

an infinite number of statements that are not remotely "solemn declarations or affirmations." Crawford, 541 U.S. at 51.

Along those lines, Crawford made clear that many statements that might be useful to law enforcement are far afield from the core purpose of the confrontation right. For instance, the clause does not prevent prosecutorial use of an "off-hand, overheard remark" – for example, a "casual remark" made by a person to an acquaintance – because such a remark "bears little resemblance to the civil-law abuses the Confrontation Clause targeted." Crawford, 541 U.S. at 51. In acknowledging that the clause has nothing to do with such remarks, this Court made no exception for casual remarks that are "accusatory," including even remarks made to a police officer.

And Crawford made plain that the statements governed by the clause are "solemn" and "formal." Crawford, 541 U.S. at 51. Obviously, not every statement to a police officer, even when offered in answer to the officer's questions, is solemn or formal. Crawford is thus inconsistent with petitioner Hammon's "one size fits all" approach, in which any accusatory declaration made to law enforcement personnel is testimonial. For instance, a witness's statement asking a police officer for aid against an attacker, during the commission of a crime or shortly thereafter – "officer, get him, he just robbed me" -- is not testimonial. It is not formal. The declarant does not anticipate that it will be introduced at trial. Indeed, even if such a statement is elicited by the officer's inquiry as to what has just happened, the officer likewise does not expect the answer to become evidence at a trial.

That informal statements may be the product of police questioning calls to mind another aspect of the Crawford analysis. This Court noted in Crawford that responses to "interrogation" may be testimonial, 541 U.S. at 52-53. But the statement found by Crawford to be testimonial was the fruit of structured questioning in a station house. That interrogation was the equivalent of an interrogation by a Marian justice of the peace. A public official in Washington State asked questions after having been persuaded that a crime had occurred, and having narrowed the scope of his investigation. Pursuant to an agenda, that public official engaged in structured questioning to develop a particular theory about what occurred and who was responsible. Such inquiries are readily recognized as "interrogations" by anyone with a television set; we see them constantly on "Law and Order" and on many other drama shows. And, as Crawford and innumerable other court cases demonstrate, such formal, structured interrogations are a part of everyday police work. It is fair to consider them testimonial. See Berger, The Deconstitutionalization of the Confrontation Clause: A Proposal for a Prosecutorial Restraint Model, 76 Minn. L. Rev. 557, 601-02, 609 (1992).

But all that has to do with agenda-driven interrogations. An officer who responds to a crime scene will have little, if any, information concerning what has happened. The officer will need to garner facts to ascertain whether a crime occurred, whether anyone was hurt and is in need of medical assistance, whether a suspect is still in the area and, if so, whether he poses a danger to the civilians who have remained and to the officers who are looking for him. The need fully to understand what has happened will regularly require officers to elicit more than a brief synopsis of the crime from the witnesses and

victims. Still, these on-the-scene inquiries are not "interrogations" designed to produce an evidentiary statement for trial. The officer has no agenda other than to learn what happened. These informal inquiries thus are not "testimonial."[11]

Crawford has created dramatic uncertainty in the state and federal courts as to whether hearsay will now generally be barred in criminal prosecutions. That uncertainty is reflected in the myriad cases citing Crawford, some of which have read Crawford as petitioners do. Even the most routine applications of hearsay exceptions, including those involving collateral facts -- such as the maintenance of breathalyzer equipment or the absence of a record from a government file -- have been disallowed. See, e.g., People v. Orpin, 8 Misc. 3d 768, 796 N.Y.S.2d 512 (Justice Court, Town of Irondequoit, Monroe Co. 2005); People v. Niene, 8 Misc. 3d 649, 798 N.Y.S.2d 891 (Crim. Ct. N.Y. Co. 2005). And the disagreement about excited utterances, including those in 911 calls, has been profound. If petitioners are successful here, the result will be that in many thousands of cases every year, juries will be denied information that, before Crawford, was routinely considered competent evidence and was never believed to violate the right of confrontation.

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[11] Petitioner Hammon supposes that, if this Court maintains its view that only formal interrogations constitute "testimonial" hearsay, initial responders to crimes may simply decide to avoid foreknowledge of what they will face at crime scenes. Hammon Brief: 8, 37-40. That cynical view not only reflects unjustified contempt for law enforcement officers, but also absurdly underestimates their instinct for self-preservation.

But the understanding of the Confrontation Clause that is championed by petitioners, and that is now routinely disrupting criminal cases, has no basis in history. The discredited Roberts analysis resulted in the scrutiny of a vast number of hearsay statements under the clause, but barred hearsay only sporadically. Crawford substituted a rule absolutely barring hearsay in a narrow category -- "testimonial" hearsay – if the defendant had no opportunity to cross-examine the declarant. Petitioners conflate the two approaches, seeking to have their cake and eat it too. They would extend the Confrontation Clause to vast amounts of hearsay, and at the same time bar all that hearsay absolutely. NDAA asks this Court to reject petitioners' invitation to follow that novel and unprecedented path, for it would make it far more difficult to obtain just results in criminal cases.

## Part Three: The Statements in the Present Cases are not "Testimonial," and Due Process should be the Ultimate Test of the Propriety of their Introduction at Trial

The statements at issue in the Hammon and Davis cases are not testimonial hearsay. They bear none of the indicia of the statements in the core area covered by the Confrontation Clause: they were not formal statements akin to testimony or affidavits, made for presentation in court.[12] To be sure, the declarants were asked questions by

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[12] An affidavit signed by the victim was of course introduced at the trial of petitioner Hammon. The Indiana Supreme Court considered the introduction of the affidavit to be harmless Crawford error, given the oral statements of the victim that were recounted at trial. See Hammon Brief: 4-6.

agents of the state. But there was no "interrogation" of the sort addressed in Crawford, in which officials with an investigative agenda seek to obtain evidence about a past crime. Rather, in each case the declarant spoke with an agent of the state who lacked advance knowledge even that a crime had taken place.

It remains to discuss a question left open in Crawford. The fact that the statements at issue are not "testimonial" places them outside the core area of confrontation rights protected by the Confrontation Clause. In Crawford, however, this Court left open the question of whether the clause offers some protection outside this core area of concern. See Crawford, 541 U.S. at 68. Amicus urges the Court now to state, consistent with its decisions before Roberts, that the Confrontation Clause addresses testimonial statements alone, and does not more generally constitutionalize a prohibition against hearsay.

If instead the Confrontation Clause applied outside the testimonial area, its application would presumably take one of two forms. First, the clause might – as petitioner Davis in particular has urged – be read to bar any hearsay as to which no exception was recognized in 1791. As noted above, however, that approach is flatly inconsistent with the history of the clause, especially as it has always been understood by members of this Court. The clause was never designed to freeze in place the law of evidence as in stood in 1791. Second, the clause might be read to bar "unreliable" non-testimonial hearsay. But in Crawford this Court justly laid to rest the Roberts reliability framework, and that framework would be as inadequate for admitting non-testimonial hearsay as it has proved to be for admitting all hearsay.

Petitioners seem to believe that the Confrontation Clause must be broadly read, lest the courts be flooded with hearsay beyond the narrow class of testimonial statements. Petitioner Hammon, for example, is troubled by fears that if only a narrow class of testimonial hearsay is covered by the clause, a witness could seal a statement in a pot, or provide an account to a friend with the understanding that the friend would then repeat it in court. See Hammon Brief : 11.

But those fears are groundless. The Confrontation Clause is of course not the only rule that keeps hearsay out of criminal proceedings. State constitutional provisions also guarantee confrontation, and many of those provisions might, in the post-Crawford world, be read more broadly than the Sixth Amendment. More importantly, the Federal Rules of Evidence and every state's law of evidence restrict the introduction of hearsay. The statement in a pot, and the account provided to a friend, would not be admissible in any jurisdiction.

Moreover, the Due Process Clauses of the Fifth and Fourteenth Amendments will always provide a "backstop," in the event that a state employs an unreasonably permissive rule on the admissibility of non-testimonial hearsay. Due Process has already been declared the basis on which a defendant can obtain relief when a state hearsay rule is unduly restrictive. Chambers v. Mississippi, 410 U.S. 284 (1973). Similarly, the Due Process Clause would afford a defendant relief when a state rule about non-testimonial hearsay is unduly permissive. Notably, for this Court to recognize that principle in Hammon and Davis would create a logical complement to Chambers. But when due process guarantees are not implicated, the Framers intended to leave each state free to adopt rules of evidence that seem sensible to its own citizens. See Estelle v.

McGuire, 502 U.S. 62, 67-70 (1991); Spencer v. Texas, 385 U.S. 554, 563-64 (1967) ("Cases in this Court have long proceeded on the premise that the Due Process Clause guarantees the fundamental elements of fairness in a criminal trial. . . . But it has never been thought that such cases establish this Court as a rule-making organ for the promulgation of state rules of criminal procedure").

* * *

The short-lived Roberts era aside, this Court has never understood the Confrontation Clause to regulate all hearsay or to work a substantial revision of the rules of evidence. And certainly, this Court never hinted that the clause barred the states from refining their views on the admissibility of excited utterances or of any other garden-variety types of hearsay. As Crawford explained, a hearsay declarant does not qualify as a "witness" for confrontation purposes unless he has made a "solemn declaration" akin to a formal statement under oath. A 911 call or an excited remark at the scene of a crime -- whether made to a responding officer or to anyone else -- is not "testimony" in any sense of the word. Petitioners twist the plain meaning of the clause in an effort to expand the constitutional right of confrontation beyond all plausibility and precedent.

## CONCLUSION

The judgments against petitioners should be affirmed.

Respectfully submitted,

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IN THE

# Supreme Court of the United States

ADRIAN MARTELL DAVIS,
*Petitioner*,

v.

WASHINGTON,
*Respondent*.

HERSHEL HAMMON,
*Petitioner*,

v.

INDIANA,
*Respondent*.

**On Writs of Certiorari to the Supreme Courts of Washington and Indiana**

## BRIEF OF *AMICI CURIAE* THE NATIONAL NETWORK TO END DOMESTIC VIOLENCE, INDIANA AND WASHINGTON COALITIONS AGAINST DOMESTIC VIOLENCE, LEGAL MOMENTUM, *ET AL.* IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS


| | Page |
|---|---|
| TABLE OF AUTHORITIES | iii |
| INTEREST OF THE *AMICI CURIAE* | 1 |
| SUMMARY OF ARGUMENT | 2 |
| ARGUMENT | 4 |
| I. THE LEGAL AND SOCIAL HISTORY OF DOMESTIC VIOLENCE CREATES UNIQUE BARRIERS TO PROSECUTION | 4 |
| A. Domestic Violence is Characterized by a Pattern of Terror, Domination and Control | 5 |
| B. The Legal System Has Historically Condoned or Ignored Domestic Violence | 7 |
| II. BATTERING CREATES A DYNAMIC THAT COMPROMISES THE TRUTH-GATHERING FUNCTION OF THE PROSECUTOR AND REQUIRES THE USE OF ALTERNATIVE RELIABLE EVIDENCE | 9 |
| A. Domestic Violence Places Most Battered Women in an Untenable Position With Regard to Criminal Prosecution | 10 |
| B. Evidence-Based Prosecution is Often the Only Effective Means to Hold Batterers Criminally Accountable | 14 |
| III. AN OVERLY EXPANSIVE VIEW OF THE TERM "TESTIMONIAL" WILL CONVERT THE CONFRONTATION CLAUSE FROM A SHIELD INTO A SWORD TO BE WIELDED AGAINST VICTIMS OF DOMESTIC VIOLENCE | 16 |

TABLE OF CONTENTS—Continued

Page

A. An Overly Expansive Definition of a "Testimonial" Statement Will Cripple the Prosecution of Batterers ..... 16

B. Making Criminal Prosecution Dependent on Victims' Testimony Will Deliver Control of Domestic Violence Cases into the Hands of Abusers ..... 19

C. The Doctrine of Forfeiture Does Not Adequately Solve the Problems a Broad Definition of "Testimonial" Poses for Domestic Violence Cases ..... 21

D. A Broad Interpretation of "Testimonial" Will Compel Prosecutors to Sanction Victims ..... 26

IV. A NARROW INTERPRETATION OF "TESTIMONIAL" IS CONSISTENT WITH THE FRAMERS' INTENT ..... 28

CONCLUSION ..... 30

APPENDIX A ..... 1a

APPENDIX B ..... 39a

# TABLE OF AUTHORITIES

CASES — Page

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| CONSTITUTION | |
| U.S. Const. Amend. VI | 29 |
| LEGISLATIVE HISTORY | |
| The Violence Against Women Act of 1993, S. Rep. No. 103-38 (1993) | 7 |
| RULES | |
| Fed. R. Evid. 804(b)(6) | 24 |

TABLE OF AUTHORITIES—Continued


| | Page |
|---|---|
| S. Ct. R. 37.3(a) | 1 |
| S. Ct. R. 37.6 | 1 |
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Page

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Page

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Page

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## INTEREST OF THE *AMICI CURIAE*[1]

*Amici* include over fifty non-profit organizations devoted to remedying domestic violence through legal, legislative, and policy initiatives, as well as organizations and individuals providing shelter, advocacy, and legal and counseling services to survivors of domestic violence. *Amici* collectively have hundreds of years of experience working with survivors of domestic violence, including undertaking extensive efforts to improve the justice system's response to victims of domestic violence.

*Amici* are extremely concerned about the impact of the *Crawford* case on the ability of the State to prosecute domestic violence, hold batterers accountable, and provide protection to victims and their children. For these reasons, therefore, *Amici* are submitting this brief in support of the Respondents.[2]

---

[1] Pursuant to Sup. Ct. R. 37.6, *Amici Curiae* state that no counsel representing a party authored this brief in whole or in part, and no person or entity other than the *Amici Curiae* or their counsel made a monetary contribution to the preparation or submission of this brief.

[2] Pursuant to Sup. Ct. R. 37.3(a), counsel of record for both Petitioners and Respondents have consented to the filing of this brief in letters that have been lodged with the clerk. The identities and interest of *Amici* are described in Appendix A to this brief.

## SUMMARY OF ARGUMENT

These cases present an opportunity to clarify the uncertainty created by *Crawford v. Washington*, 541 U.S. 36 (2004), which has led many prosecutors to drop domestic violence charges or seek to compel victims of abuse to testify under extreme duress. Adhering to the original meaning of the Confrontation Clause does not require this Court to ignore the brutal reality of domestic violence or permit batterers to evade prosecution by wielding the Clause as a sword against their victims.

Domestic violence is a pervasive problem with its roots in centuries of legal and social norms sanctioning men's use of violence in the family. Due to the judicial system's historic reluctance to prosecute these crimes and its inability to protect victims from the weapons of control available to batterers, many abused women are unwilling or unable to testify in criminal proceedings. Over time, the criminal justice system has recognized the forces that work to prevent victims from testifying and established alternative means to obtain reliable evidence. The resulting practice of "evidence-based" prosecution ensures that violent abusers are held accountable when their own conduct makes the victim's testimony impossible to obtain. In the short time since *Crawford* was decided, however, many prosecutors and courts have responded by dropping or dismissing charges in a disturbing range of cases. Adoption of a broad definition of "testimonial" will unquestionably further cripple the potential for evidence-based prosecution, all but ensuring that many violent criminals go unpunished and undeterred.

The Confrontation Clause addressed a specific evil identified by the Framers: unchecked State inquisitorial power designed to use out-of-court testimony from a witness in order to deprive the defendant of his opportunity to confront his accuser in court. In domestic violence prosecutions, a different evil exists: here, the defendant, not the State, seeks

to silence the key witness. In adopting the Confrontation Clause, the Framers did not and could not have fully anticipated this result, in which the only or key witness is subject to the control and coercion of the accused.

Determining the application of the Confrontation Clause to domestic violence—a phenomenon that was widespread at the time the Clause was adopted and whose effects on the judicial process were unexamined—necessarily involves "some degree of estimation." *Crawford v. Washington*, 541 U.S. 36, 52 n.3 (2004). Nonetheless, a definition of "testimonial" that is faithful to the original purpose of the Confrontation Clause will continue to allow some forms of evidence-based prosecution of domestic violence cases while protecting constitutional safeguards and preserving the integrity of the adversary process. *E.g.*, *id.* at 51 ("'*ex parte* in-court testimony or its functional equivalent'") (citation omitted); *White v. Illinois*, 502 U.S. 346, 365 (1992) (Thomas, J., joined by Scalia, J., concurring in part and concurring in judgment) ("extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions"). By contrast, Petitioners' over-broad definition would sharply undermine the State's ability to protect victims and hold batterers accountable; indeed, it would be incompatible with judicial fairness.

For these reasons, the judgments in *Davis v. Washington* (05-5224) and *Hammon v. Indiana* (05-5705) should be AFFIRMED.

## ARGUMENT

### I. THE LEGAL AND SOCIAL HISTORY OF DOMESTIC VIOLENCE CREATES UNIQUE BARRIERS TO PROSECUTION.

Domestic violence[3] is a profound social problem with far-reaching consequences.[4] It accounts for a substantial

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[3] We define domestic violence as the physical, sexual, psychological, and/or emotional abuse of a victim by her intimate partner, with the goal of asserting and maintaining power and control over the victim. *See, e.g.*, Angela Corsilles, *No-Drop Policies in the Prosecution of Domestic Violence Cases: Guarantee to Action or Dangerous Solution?*, 63 Fordham L. Rev. 853, 853 (1994); Nichole Miras Mordini, Note, *Mandatory State Interventions for Domestic Abuse Cases: An Examination of the Effects on Victim Safety and Autonomy*, 52 Drake L. Rev. 295, 300 (2004). While domestic violence also plagues the elderly and children, this brief focuses on intimate partner violence. Women may perpetrate domestic violence, and violence also occurs in same sex relationships; the vast majority of victims, however, are women and their attackers are men. *See, e.g.*, Callie Marie Rennison, Bureau of Justice Stat., U.S. Dep't of Justice, Crime Data Brief: *Intimate Partner Violence, 1993-2001* 1 (NCJ 197838, Feb. 2003), http://www.ojp.usdoj.gov/bjs/pub/pdf/ipv01.pdf (women are 85% of victims).

[4] Approximately one in four women, and 7% of men, report having been physically assaulted by a current or former intimate partner. Patricia Tjaden & Nancy Thoennes, Nat'l Inst. of Justice & Ctrs. for Disease Control & Prevention, *Full Report of the Prevalence, Incidence, and Consequences of Violence Against Women: Findings from the National Violence Against Women Survey* iv (NCJ 183781, Nov. 2000), http://www.ncjrs.gov/pdffiles/172837.pdf. Estimates of the number of American women assaulted and/or raped each year by an intimate partner range from 1.5 million to 4 million. *Id.* (1.5 million); Am. Psychol. Ass'n, *Violence and the Family: Report of the American Psychological Association Presidential Task Force on Violence and the Family* 10 (1996) (4 million). At least half of women murdered are killed by intimates. Violence Pol'y Ctr., *When Men Murder Women: An Analysis of 2003 Homicide Data* 3 (Sept. 2005), http://www.vpc.org/studies/wmmw2005.pdf (92% of female victims were murdered by someone they knew; 62% of these were killed by husbands or intimate partners).

proportion of criminal justice system activity.[5] Characterized by a pattern of terror, domination and control, domestic violence inexorably obstructs victims' efforts to escape abuse and achieve safety. The legal system has historically condoned (or, at best, ignored) domestic violence. Understanding this historical context is essential to properly applying the Confrontation Clause to contemporary cases.

### A. Domestic Violence is Characterized by a Pattern of Terror, Domination and Control.

While physical violence is ordinarily the sole aspect of domestic violence that reaches the criminal justice system, battering includes many other forms of coercion and control. *See* Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 Mich. L. Rev. 1, 93 (1991) ("battering is power and control marked by violence and coercion"). Most battered women are subjected to "an *ongoing* strategy of intimidation, isolation, and control that extends to all areas of a women's life, including sexuality; material necessities; relations with family, children, and friends; and work." Evan Stark, *Re-Presenting Woman Battering: From Battered Woman Syndrome to Coercive Control*, 58 Alb. L. Rev. 973, 986 (1995). Batterers' means of disempowering and controlling their victims include not

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[5] Violence between intimate partners (spouses and boyfriends and girlfriends) accounted for 34% of all violent crimes recorded by police in eighteen states and the District of Columbia. Matthew R. Durose et al., Bureau of Justice Stat., U.S. Dep't of Justice, *Family Violence Statistics* 29 (NCJ 207846, June 2005), http://www.ojp.usdoj.gov/bjs/pub/pdf/fvs05.pdf. In a study of eleven large counties during May 2000, approximately one third of felony assault charges involved family violence (broadly defined). *Id.* at 45.

only violence, but also sexual, emotional and economic abuse, psychological intimidation, social isolation, and threats to and about the children or other family members. *See* Appendix 65a, Letter 20[6] (victim "cut off from friends and family" and "truly believed" she had "no one to help"); Mary Ann Dutton, *Understanding Women's Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome*, 21 Hofstra L. Rev. 1191, 1204-06 (1993). Batterers often issue lists of "rules" that their partners and children are required to obey, at the risk of invoking violence. Karla Fischer, Neil Vidmar & Rene Ellis, *The Culture of Battering and the Role of Mediation in Domestic Violence Cases*, 46 S.M.U. L. Rev. 2117, 2126-29 (1993) (describing batterer and victim as "the Ruler and the Ruled"). *See also* App. 68a, Letter 21 (victim told she "didn't know how to be a woman," criticized for the way she "cooked, washed clothes, [wore] hair, raise[d their] child, everything"); App. 57a, Letter 11 (victim assaulted because she "didn't launder correctly").

Not surprisingly, victims' efforts to escape their abusers often lead to escalations of violence, owing to the threat such efforts pose to the batterer's control of the victim. Research consistently documents that "the greatest risk for serious injury or death from violence is at the point of separation or at the time when the decision to separate is made." Am. Psychol. Ass'n, *supra*, at 39; App. 49a, Letter 6 (describing murders of mothers and children after separation from abusers); Mahoney, *supra*, at 5-6, 65-68 (detailing stories of post-separation attacks). Indeed, 75% of the most serious injuries and deaths occur after battered women leave their abusers. *See* Barbara Hart, *State Codes on Domestic Violence: Analysis, Commentary and Recommendations*, 43

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[6] Appendix B is a compendium of letters from prosecutors, law enforcement officers, advocates, and victims about their relevant experiences in domestic violence cases.

Juv. & Fam. Ct. J. 34 (1992) (citations omitted). Batterers often specifically instruct their victims never to call the police. *See* App. 39a, Letter 1 (victim told by her batterer that "if she ever called 911 on him, he would come back and kill her"). Pursuing prosecution, thus, is not only an assertion of autonomy, it directly defies the abuser's control, exposing the victim to considerable risk of violence.

### B. The Legal System Has Historically Condoned or Ignored Domestic Violence.

Batterers' ability to control their victims has been facilitated by the failure of the legal system to respond adequately to incidents of domestic violence. The Violence Against Women Act of 1994 was enacted by Congress after extensive legislative hearings documenting the historic and pervasive failure of state criminal justice systems to respond appropriately to domestic violence and sexual assault, including substantial documented gender bias in the courts. *The Violence Against Women Act of 1993*, S. Rep. No. 103-38, at 41-47 (1993); G. Kristian Miccio, *A Reasonable Battered Mother? Redefining, Reconstructing and Recreating the Battered Mother in Child Protective Proceedings*, 22 Harv. Women's L.J. 89, 90 (1999) (VAWA reflects Congress' finding that "the state, through nonfeasance and misfeasance, contributes to the systemic abuse of women within the family"). Such findings were not new. *See* U.S. Dep't of Justice, *Attorney General's Task Force on Family Violence: Final Report* 16-18 (Sept. 1984); Gail A. Goolkasian, Nat'l Inst. of Justice, *Confronting Domestic Violence: A Guide for Criminal Justice Agencies* 55 (May 1986) (describing historical reluctance of prosecutors to take domestic violence cases seriously).

Modern judicial inadequacies are in part a product of history. Until approximately the late 19th century, wives were legally subordinated to their husbands. "By law, a husband acquired rights to his wife's person . . . . A wife was

obliged to obey and serve her husband . . . . As master of the household [he] could command [her] obedience, and subject her to corporal punishment or 'chastisement' if she defied his authority." Reva B. Siegel, *'The Rule of Love': Wife Beating as Prerogative and Privacy*, 105 Yale L.J. 2117, 2122-23 (1996); 1 William Blackstone, *Commentaries* *421, *444-45. Reported decisions endorsed Blackstone's "modest chastisement," *Bradley v. State*, 1 Miss. (1 Walker) 156, 158 (1824) and approved of force "to control [a wife's] unruly temper." *State v. Black*, 60 N.C. 262 (1864). *See generally* Siegel, *supra*, at 2122-25 & n.25 (collecting cases); Rebecca Emerson Dobash & Russell P. Dobash, *Violence Against Wives* 31-74 (1979) (surveying history of wifebeating and laws through the early 20th century).

More recently, although the legal system no longer endorsed these antiquated gender distinctions, police and prosecutors continued a policy of indifference to domestic violence victims, fueled by society's belief in the trivial and non-criminal nature of this abuse. *See* Dobash & Dobash, *supra*, at 207-22; James B. Halsted, *Domestic Violence: Its Legal Definitions, in Domestic Violence: The Changing Criminal Justice Response* 143, 155 (Eve S. Buzawa & Carl G. Buzawa eds., 1992). Up until at least the 1980s, police typically ignored domestic violence calls or purposely delayed their response. *See AG's Task Force Final Report*, *supra*, at 16-18; Joan Zorza, *The Criminal Law of Misdemeanor Domestic Violence, 1970-1990*, 83 J. of Crim. L. & Criminology 46, 46-60 (1992); Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 Harv. L. Rev. 1849, 1857 (1996). Studies conducted in the 1980s and 1990s found that arrests occurred in only 3 to 14% of all intimate partner cases to which officers actually responded. Eve S. Buzawa & Carl G. Buzawa, *supra, Introduction, in Domestic Violence: The Changing Criminal Justice Response* (1992) at vii, xvi. Similarly, prosecutors historically resisted prosecuting abuse,

downgraded severe violence to misdemeanor charges, and were all too eager to drop cases when victims expressed any ambivalence.[7] Only recently, under pressure from domestic violence advocates, have police and prosecutors around the country begun to take domestic violence seriously and to develop effective means of prosecuting it. *See* Sec. II.B., *infra*.

## II. BATTERING CREATES A DYNAMIC THAT COMPROMISES THE TRUTH-GATHERING FUNCTION OF THE PROSECUTOR AND REQUIRES THE USE OF ALTERNATIVE RELIABLE EVIDENCE.

Because victims of domestic violence remain very much at risk after separation or reporting of their abuse, and because the legal system has often failed to protect them, many victims are ambivalent or fearful about prosecution. They report being threatened by their abusers that their children will be hurt, App. 54a, Letter 9, fearing that they will be killed and their children taken, App. 49a, Letter 6, and feeling that "the court system doesn't care," App. 64a, Letter 19. *See also* App. 54a, Letter 9 (defendant called victim at work notwithstanding no-contact order and "threatened that if she did not drop the charges, he would continue to harass her and her kids" and that "[h]e tried to kill her before, but . . . the next time he [would] not fail to do so"); App. 56a, Letter 10 (defendant dissuaded victim from

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[7] As one prosecutor stated: "When I look back at how it used to be with battered women, I can see that it was a self-fulfilling prophesy. We'd file if she really wanted us to, but we knew that she'd want us to drop charges later . . . we may have even told her so. Then we sent her back home, often back to her abuser, without any support or protection at all. Sure enough, she wouldn't follow through and we'd think, 'It's always the same with these cases.'" Goolkasian, *supra*, at 55.

testifying by telling her he'd kill her). Indeed, one survivor writes:

> [I]t's not easy to testify against someone you love, someone who has hurt you, someone you are afraid of, someone you depend on, someone you have a child with or someone who scares the hell out of you. For me . . . all of those things are in one person.

App. 81a, Letter 32.

### A. Domestic Violence Places Most Battered Women in an Untenable Position With Regard to Criminal Prosecution.

While some battered women eagerly pursue criminal prosecution as a means of seeking safety and accountability, many others fear participation in the judicial process, for several reasons. A paramount concern is fear for their safety and that of their children. James Ptacek, *Battered Women in the Courtroom* 145-49 (1999) (detailing fear of retaliation). Studies back this up. Tom Lininger, *Prosecuting Batterers After Crawford*, 91 Va. L. R. 747, 769 (2005) (threats of retaliatory violence in as many as half of all cases; 30% of battered women reassaulted while batterer being prosecuted). *See generally* Deborah Epstein, Margret E. Bell & Lisa A. Goodman, *Transforming Aggressive Prosecution Policies: Prioritizing Victims' Long-Term Safety in the Prosecution of Domestic Violence Cases*, 11 Am. U. J. Gender Soc. Pol'y & L. 465, 467 n.4, 476-77 (2003).

> [W]hen it came time to press charges . . I got scared to go to court and face him. He would threaten me that if he went to jail I would be sorry.

App. 76a, Letter 27.

> [J]ust the thought of having to testify against him made me sick—I shook uncontrollably the first three times I was there . . . I can't begin to explain how scary it is to have to see your abuser again and for him to see you, especially in a courtroom, because there's no guarantee of safety once you leave it.

App. 75a-76a, Letter 25.

Victims who take action against or leave an abuser also risk losing their children. One study found that 25% of batterers directly threatened kidnapping the victim's children if legal action was pursued; they also frequently threatened to lie or exaggerate the victim's personal problems to protective services. Eve S. Buzawa & Carl G. Buzawa, *Domestic Violence: The Criminal Justice Response* 3, 88 (James A. Inciardi ed., 2d ed. 1996); Ptacek, *supra*, at 140 (more than half the time, batterers threaten to take children, file for custody, or report victim to social services). Surprisingly often, when the parties separate, batterers win joint or sole custody of children. Joan S. Meier, *Domestic Violence, Child Custody, and Child Protection: Understanding Judicial Resistance and Imagining the Solutions*, 11 A.U. J. of Gender, Soc. Pol. & Law 657, 662 n.19 & accompanying text (2003).

In addition, many victims face untenable economic choices. *See* Buzawa & Buzawa, *supra*, *Domestic Violence: The Criminal Justice Response* (2d ed. 1996) at 88-89 (finding economic threats made by 42% of abusers). Where victims are unemployed or earning very little, the threat of loss of financial support can be critical. *Id.* (31% of the victims were unemployed and 67% earned under $10,000). Even victims who are employed regularly face myriad acts of sabotage, harassment, and interference designed to undermine their own access to income. *See, e.g.*, Washington State University et al., *Intimate Partner Violence . . . It's a Work-place Issue* 17 (Jan. 2005), http://www.caepv.org/member

center/files/Intimate%20Partner%20Violence-A%20Workplace%20Issue%20Spokane%20Co.%20(January%202003).pdf (34% of employed female intimate partner violence victims report work disruption by partner's violence); Jody Raphael & Richard M. Tolman, *Trapped In Poverty; Trapped By Abuse: New Evidence Documenting the Relationship Between Domestic Violence and Welfare* (Apr. 1997), http://www.ssw.umich.edu/trapped/ pubs_trapped.pdf.

Perhaps the most pervasive aspect of battering that undermines victims' ability to testify is trauma. "The common denominator of psychological trauma is a feeling of 'intense fear, helplessness, loss of control, and threat of annihilation.'" Judith Herman, *Trauma and Recovery* 28, 32 (1992) (citation omitted). After the concept of post-traumatic stress disorder gained legitimacy in the 1980s, it became "clear that the psychological syndrome seen in survivors of rape, domestic battering, and incest was essentially the same as the syndrome seen in survivors of war." *Id.* at 32. Trauma can profoundly disable a person's ability to lead a normal life and can short-circuit their emotional and psychological functioning.

Most importantly, "[e]fforts to seek justice or redress often involve further traumatization," because, among other things, "this decision engages the survivor with a legal system that may be indifferent or hostile to her." *Id.* at 72, 165. Testifying in court forces a victim to face her terrorizer, retell the trauma to his face, and endure potentially aggressive cross-examination. App. 56a, Letter 9 (every time victim sees her boyfriend or even a photograph, she re-lives both the rape and the battering); App. 60a-61a, Letter 14; App. 63a, Letter 18. All of these phenomena are massive triggers for re-traumatization. As one survivor put it:

> Today, even ten years later, after years of counseling to become whole again—I still have a hard time facing him in court in matters involving the children. Over ten years after my last beating it still makes me throw-up when I have to face him. I break out in a horrible, drenching cold sweat. I shake from the tips of my fingers to toes, [which] I usually have to consciously place on the ground with force to stop my heels from clacking in the courtroom. . . . I often have to seek medical attention afterwards for migraines.

App. 67a, Letter 20. In short, "if one set out by design to devise a system for provoking intrusive post-traumatic symptoms, one could not do better than a court of law." Herman, *supra*, at 72; Epstein et al., *supra*, 11 Am. U. J. L. & Soc. Pol. at 474-75.

The net effect of all these obstacles is that battered women are far more likely to avoid participation in criminal trials or recant their accusations than any other crime victims. Lininger, *supra*, at 768. It is estimated that battered women recant or refuse to cooperate with the prosecution approximately 80-90% of the time. *Id.*; Douglas E. Beloof & Joel Shapiro, *Let the Truth Be Told: Proposed Hearsay Exceptions to Admit Domestic Violence Victims' Out of Court Statements as Substantive Evidence*, 11 Colum. J. Gender & L. 1, 3-4 (2002). A study in New York City found that 80-90% of victims in domestic violence cases refuse to cooperate. Richard R. Peterson, *Combating Domestic Violence in New York City: A Study of DV Cases in the Criminal Courts*, CJA Final Report 9-10 (Apr. 2003), http://www.nycja.org/research/reports/ressum43.pdf. In the 1980s and 1990s, as many as 60-80% of domestic violence cases were abandoned for this reason. Lininger, *supra*, at 771 n.121; Buzawa & Buzawa, *supra*, *Domestic Violence: The Criminal Justice Response* (2d ed. 1996) at 87. In Brooklyn

and Milwaukee, the most common reason for dismissal of domestic violence prosecutions was victims' failure to make court appearances or to testify against the defendants. Lininger, *supra*, at 769; App. 41a, Letter 1 (in 2005 in Milwaukee, 96% of dismissals occurred because victims did not appear in court for trial).

### B. Evidence-Based Prosecution is Often the Only Effective Means to Hold Batterers Criminally Accountable.

Over the past three decades, concerted pressure from advocates and policy-makers[8] has led many police departments and prosecutors to revise their practices with respect to domestic violence. The development of evidence-based prosecution is among the most important of these reforms. Evidence-based prosecution focuses on the gathering of reliable evidence such as 911 tapes, photographs, medical records, spontaneous declarations by the victim to the officers, admissions by the defendant, neighbors' testimony, relatives' testimony, and general police officer testimony related to the case and the subsequent investigation, in order to make a case that does not depend on

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[8] The Department of Justice, the National Council of Juvenile and Family Court Judges, the International Association of Chiefs of Police, and the ABA have all issued authoritative policy documents supporting more aggressive criminal justice responses, including mandatory or pro-arrest policies, no-drop and evidence-based prosecution practices. *See, e.g., AG's Task Force Final Report, supra;* Goolkasian, *supra;* National Council of Juvenile and Family Court Judges, *Family Violence: Improving Court Practice* (1990) and *Family Violence: State-of-the-Art Court Programs* 55-86 (1992); International Association of Chiefs of Police, National Law Enforcement Policy Center, *Model Policy on Domestic Violence* (1996 & 1997); Am. Bar Ass'n, *The Impact of Domestic Violence On Your Legal Practice: A Lawyer's Handbook* 340-45 (2d ed. 2004) (recommending victim support and evidence-based prosecution).

victim cooperation. *See* Deborah Epstein, *Procedural Justice: Tempering the State's Response to Domestic Violence*, 43 Wm. & Mary L. Rev. 1845, 1858 (2001); Casey G. Gwinn & Sgt. Anne O'Dell, *Stopping the Violence: The Role of the Police Officer and the Prosecutor*, 20 W. St. U. L. Rev. 297, 313 (1993) (estimating that 60% of cases in San Diego are provable on the basis of this type of evidence).

Because it is not possible to require victims of domestic violence to testify in every case, evidence-based prosecutions have become the most effective means of furthering the compelling public interest in ensuring that violent abusers are brought to justice and victims are protected. Gwinn & O'Dell, *supra*, at 311; Epstein, *supra*, 43 Wm. & Mary L. Rev. at 1858; Corsilles, *supra*, at 877-78. In Duluth, evidence-based prosecution methods have resulted in a significant increase in the conviction rate. Mary E. Asmus, Tineke Ritmeester & Ellen L. Pence, *Prosecuting Domestic Abuse Cases in Duluth: Developing Effective Prosecution Strategies From Understanding the Dynamics of Abusive Relationships*, 15 Hamline L. Rev. 115, 136 (1991). In San Diego, the domestic violence unit obtains convictions in over 2000 cases every year using an evidence-based prosecution model. Gwinn & O'Dell, *supra*, at 314. About 30-40% of jurisdictions in the country have followed San Diego's evidence-based approach. Mark Hansen, *New Strategy in Battering Cases: About a Third of Jurisdictions Prosecute Even Without Victim's Testimony*, 81 ABA J. 14 (Aug. 1995). Without evidence-based prosecution, too many cases would be impossible to prosecute. *Cf.* Sec. III.A., *infra*.[9]

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[9] The ACLU and NACDL amicus briefs both argue that domestic violence prosecutions can be accomplished by other means, such as providing better support for victims, including the provision of safe living arrangements, more comprehensive social services and better communications about the case. Brief *Amicus Curiae* of the American Civil Liberties Union, the ACLU of Washington and the Indiana Civil Liberties

## III. AN OVERLY EXPANSIVE VIEW OF THE TERM "TESTIMONIAL" WILL CONVERT THE CONFRONTATION CLAUSE FROM A SHIELD INTO A SWORD TO BE WIELDED AGAINST VICTIMS OF DOMESTIC VIOLENCE.

The rights accorded to defendants under the Confrontation Clause were intended as a "shield" to protect the defendant from potential prosecutorial abuses. *See Taylor v. Illinois*, 484 U.S. 400, 410 (1988). Adopting an overly expansive view of "testimonial" statements, as urged by Petitioners, will convert this "shield" into a sword to be wielded by batterers to silence their victims, crippling the ability to prosecute domestic violence cases and prejudicing the adversary process. Meanwhile, battered women will be subjected to increased state coercion, putting them at risk of further physical jeopardy or re-traumatization.

### A. An Overly Expansive Definition of a "Testimonial" Statement Will Cripple the Prosecution of Batterers.

While *Crawford* is relatively recent, evidence has already emerged that it has significantly undermined the prosecution of domestic violence cases. App. 48a, Letter 5 ("the

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Union in Support of Petitioners at 22-24; Brief of *Amici Curiae* the National Association of Criminal Defense Lawyers and the Public Defender Service for the District of Columbia in Support of Petitioner Hammon at 28-29. While *Amici* agree that improved support and communication with victims by prosecutors' offices is important, it alone cannot possibly eliminate the dangers or trauma that impair victims' participation. Moreover, it is unrealistic to suggest that under-funded prosecutors' offices should somehow provide funds for safe housing and ensure comprehensive social services for victims. Indeed, in *Amici*'s experience, even existing witness protection programs are rarely (if ever) available for domestic violence victims.

*Crawford* opinion has had a devastating effect on my ability to prosecute these [domestic violence] cases"); Lininger, *supra*, at 749.[10] An extensive survey of over 60 prosecutors' offices in California, Oregon and Washington, provides valuable information about the impact of *Crawford*. *Id.*[11] Among the results: 63% of respondents reported that the *Crawford* decision significantly impeded prosecutions of domestic violence; 76% indicated that after *Crawford*, their offices were more likely to drop domestic violence charges when victims recant or refuse to cooperate; and 65% reported that victims of domestic violence are now less safe in their jurisdictions than during the era preceding the *Crawford* decision. *Id.* at 750.

Additional reports from numerous jurisdictions echo these findings, and indicate that prosecutors across the country are dropping cases, or pleading them down to lower offenses, because of *Crawford*. *See* Lininger, *supra*, at 749 ("within days—even hours—of the *Crawford* decision, prosecutors were dismissing or losing hundreds of domestic violence cases that would have presented little difficulty in the past") (footnotes omitted); Robert Tharp, *Domestic Violence Cases*

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[10] *See also* Robert P. Mosteller, *Crawford v. Washington: Encouraging and Ensuring the Confrontation of Witnesses*, 39 U. Rich. L. Rev. 511, 608 (2005) ("*Crawford* has disrupted domestic violence prosecutions to a degree not seen in any other area. It erected a 'stop sign' in front of most of this evidence [evidence routinely used in victimless-prosecutions], which combined with its reluctance to treat excited utterances as a historic exception to confrontation, has caused massive disruption and great uncertainty.") (footnote omitted).

[11] The survey was conducted by researchers at the University of Oregon School of Law between October 22, 2004, and January 31, 2005. The survey involved 64 counties, covering approximately 90 percent of the total population of California, Oregon, and Washington. Lininger, *supra*, at 749.

*Face New Test: Ruling That Suspects Can Confront Accusers Scares Some Victims From Court*, Dallas Morning News, July 6, 2004, at 1A (half of all domestic violence cases set for trial in Dallas are thrown out because of *Crawford*). A Denver prosecutor also recounted letting a man accused of viciously beating his girlfriend plead to lesser charges after the accused had called his girlfriend from jail and threatened to kill her when he got out. Sarah Huntley, *Ruling Ties Prosecutors' Hands; Cross-Examination Right Reaffirmed*, Rocky Mountain News, Feb. 8, 2005, at 7S. "Without *Crawford*," the prosecutor stated, "I wouldn't have made that offer . . . . I was left with the choice, if the victim didn't show, of possibly losing the whole case." *Id.*[12] An Assistant District Attorney from Georgia summarized: "the ultimate impact of Crawford . . . is crystal clear—that is, if domestic violence victims do not testify, no conviction follows." App. 44a-45a, Letter 2.

Moreover, a significant number of domestic violence-related convictions have been overturned because of *Crawford*.[13] These cases illuminate the very real consequences

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[12] *See also* Leonard Post, *Prosecutors Feel Broad Wake of "Crawford"; Child Abuse Cases, 911 Calls Affected*, Nat'l L.J., Dec. 13, 2004, at 1 ("Since Crawford, tapes of 911 calls are no longer being routinely admitted under the excited-utterance exception to the hearsay rule, asserted Deirdre Bialo-Padin, chief of the district attorney's domestic violence bureau in Brooklyn, N.Y. 'Some judges are being very conservative,' she said.").

[13] *See, e.g., People v. Adams*, 16 Cal. Rptr. 3d 237 (Cal. Ct. App. 2004) (vacating conviction of boyfriend for inflicting corporal injury upon a cohabitant by battering her, pushing her to the ground and pushing his knee down into her abdomen while she was pregnant, because introduction of the girlfriend's statements to the police violated *Crawford*), *review granted*, 99 P.3d 2 (Cal. 2004); *Miller v. State*, 615 S.E.2d 843 (Ga. Ct. App. 2005) (overturning husband's convictions for terroristic threats and obstructing a person making an emergency phone call because failure of wife to testify at trial meant introduction of her statements to police officers violated *Crawford*, but upholding convictions for aggravated assault and battery), *accord* App. 43a-45a, Letter 2 (*id.*); *State*

that *Crawford* has had on state efforts to prosecute crimes of domestic violence. The recent ruling by the United States Court of Appeals for the Ninth Circuit in *Bockting v. Bayer*, 399 F.3d 1010, *amended*, 408 F.3d 1127 (9th Cir. 2005), which applies *Crawford* retroactively, suggests that *Crawford* is not just an impediment to future convictions, but has the potential to undo many past convictions as well.

### B. Making Criminal Prosecution Dependent on Victims' Testimony Will Deliver Control of Domestic Violence Cases into the Hands of Abusers.

If this Court adopts an overly expansive standard for "testimonial" statements it will likely strengthen the power that batterers already wield against their victims once charges are filed. Knowing the impact their actions will have on the prosecution, batterers may decide to disregard no-contact orders and confront their victims outside the courtroom in an

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*v. Grace*, 111 P.3d 28 (Haw. Ct. App.) (overturning husband's conviction for abuse of a family member due to *Crawford* violation), *cert. denied*, 107 Haw. 348 (2005); *People v. Victors*, 819 N.E.2d 311 (Ill. Ct. App. 2004) (reversing boyfriend's conviction for domestic battery because introduction of victim's statements to police officer that he pushed, punched and choked her violated *Crawford*), *appeal denied*, 214 Ill. 2d 549 (2005); *State v. Siler*, No. 02 COA 028, 2005 Ohio App. LEXIS 5933, at *16 (Ohio Ct. App. Dec. 13, 2005) (overturning husband's murder conviction of wife because statements made by the couple's son describing his father's hanging of his mother to a police officer violated *Crawford*); *Mason v. State*, 173 S.W.3d 105 (Tex. Ct. App. 2005) (overturning boyfriend's assault conviction because introduction of victim's statements to police officer's violated *Crawford*); *State v. Powers*, 99 P.3d 1262 (Wash. Ct. App. 2004) (overturning conviction for violating a domestic protection order because victim's 911 call telling operator the defendant had come to her home was testimonial).

effort to intimidate them, "wielding the *Crawford* decision as [a] sword." App. 41a, Letter 1.

It is a predictable fact of life in domestic violence cases that once an arrest is made, the abuser can be expected to mobilize all the means at his disposal to force the victim into silence and stop the prosecution. *See* Gwinn & O'Dell, *supra*, at 310 ("abusers [became] more violent and aggressive toward the victim when they learned that she controlled the outcome of the criminal prosecution."); Thomas L. Kirsch II, *Problems in Domestic Violence: Should Victims be Forced to Participate in the Prosecution of their Abusers?*, 7 Wm. & Mary J. Women & L. 383, 394 (2001) (quoting a prosecutor who said "I had one case where the woman came in [seeking] to drop [the case] and had a hand written note from the defendant that said something like, 'My court dates are July 1 and 15. Go to the prosecutor and tell them that you want the case dismissed. They'll dismiss it.'"); *See* App. 53a, Letter 8 ("defendant had a friend come to his house the day of court and 'baby-sit' the victim to make sure she didn't come to court for the trial"); App. 50a-51a, Letter 6; App. 42a, Letter 1. Batterers—already intimately familiar with the vulnerabilities of their victims—are skilled at honing in on pressure points.[14] One attorney described this scenario:

> '[If] the defendant knows that the woman has the capability of dropping the charge, he's going to beat her, he's gonna make her eat the restraining order . . . he'll make her crawl on the ground and eat cigarettes[,] and

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[14] As discussed in Section II.A., *supra*, because the victim is intimately connected to the abuser, often depending on him for financial support, or sharing a home and/or children, the abuser has infinitely greater leverage over the victim than the more typical criminal defendant.

> every other kind of abuse you can imagine as long as she has the potential to drop it, that's going to happen.'

Report of the Florida Supreme Court Gender Bias Study Commission (Mar. 1990), *reprinted in* 42 Fla. L. Rev. 803, 861 (1991) (alterations in original) (citations omitted). Far too often, such tactics are rewarded. As a former prosecutor stated, "[w]hen a batterer and his defense attorney know that a victim's failure to cooperate may result in case dismissal, they control the judicial process." Hanna, *supra*, at 1891; *see* App. 56a, Letter 10 (victim threatened and "[a]s a result . . . did not appear and her case . . . was terminated.").

In sum, a broad interpretation of the Confrontation Clause greatly reduces the State's ability to go forward without victims' testimony. This will play directly into batterers' hands by exacerbating the very problem evidence-based prosecution was designed to avoid: coercion of victims by defendants, leading to a recanting of victim testimony or refusal to cooperate with prosecutors and dismissal of the charges.

### C. The Doctrine of Forfeiture Does Not Adequately Solve the Problems a Broad Definition of "Testimonial" Poses for Domestic Violence Cases.

In *Crawford*, this Court stated that the doctrine of "forfeiture by wrongdoing" continues to apply where appropriate. 541 U.S. at 62 (citing *Reynolds v. United States*, 98 U.S. 145, 158-59 (1870)). The forfeiture doctrine embodies the principle that "[t]he Constitution does not guarantee an accused person against the legitimate consequences of his own wrongful acts." *Reynolds*, 98 U.S. at 158. While *Amici* believe that forfeiture should apply

broadly to many domestic violence cases,[15] there is good reason to believe that it will often be insufficient to address the problems described above.

Forfeiture claims in domestic violence cases could arise in at least three different circumstances: (i) where the defendant engages in post-charge coercion or interference with the intent of precluding or changing the victim's testimony; (ii) where the defendant engages in post-charge abuse or intimidation but his intent is not explicit; and (iii) where the defendant does not have further contact with the victim post-charge but the victim is too traumatized, frightened or otherwise ambivalent to testify.

While forfeiture claims have been comparatively rare in domestic violence cases until now (as prior to *Crawford* the doctrine was infrequently needed), there are numerous potential obstacles to application of forfeiture.[16] Cases such as (i) above presumably present the strongest cases for forfeiture. Nonetheless, even where the defendant has threatened or re-assaulted the victim with the intent to prevent her testimony, establishing the defendant's wrongdoing is likely to be difficult if not impossible. Victims who fear participating in a prosecution are unlikely to inform the prosecutors about new episodes of abuse and even less likely

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[15] Indeed, if contrary to Respondents' and *Amici*'s urgings, this Court should decide to reverse the decisions below, *Amici* would respectfully suggest that, instead of an outright reversal, the Court remand the cases for forfeiture hearings, while providing sufficient guidance as to the broad application of the doctrine to ensure that the problems described above are avoided.

[16] Notably, neither the Petitioners nor their supporting *amici* even address forfeiture in their briefs—even when arguing that domestic violence prosecutions can still go forward—implying that they will oppose broad application of the doctrine.

to appear for a forfeiture hearing.[17] Thus, where proof of the defendant's wrongdoing depends solely on the victim's in-court testimony (*i.e.*, where neither hearsay evidence nor other witnesses are available), the testimony will be unavailable and a forfeiture argument will fail.[18]

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[17] While the majority of courts have held that forfeiture hearings, as pretrial evidentiary determinations, require the State to meet only a preponderance of the evidence standard, several courts have held that defendants' rights to confrontation are too important to be resolved in that way and have adopted a clear and convincing standard. *See, e.g., United States v. Houlihan*, 887 F. Supp. 352 (D. Mass. 1995); *United States v. Smith*, 792 F.2d 441, 442 (4th Cir. 1986) (affirming on other grounds); *People v. Geraci*, 649 N.E.2d 817 (N.Y. 1995) (adopting clear and convincing due to importance of confrontation right). *See also United States v. Mastrangelo*, 693 F.2d 269, 273 (2d Cir. 1982) (describing Supreme Court precedents as mixed on this point but adopting preponderance standard); *State v. Jarzbek*, 529 A.2d 1245, 1255 (Conn. 1987) (requiring clear and convincing evidence of need to videotape child's testimony). This Court has held a preponderance standard applies for suppression hearings regarding possible misconduct by the police, *Lego v. Twomey*, 404 U.S. 477, 489 (1972) (voluntariness of confession); *United States v. Matlock*, 415 U.S. 164, 178 (1974) (consent to search); but has held otherwise for a question involving a constitutional right relating to the reliability of evidence, *United States v. Wade*, 388 U.S. 218, 240 (1967) (requiring clear and convincing proof that in-court identification of suspect was not tainted by unconstitutional lineup). Of course, where the problem is a reluctant or terrified witness, meeting a clear and convincing standard of proof as to the reasons for her absence may be quite difficult.

[18] Moreover, proof of interference in the domestic violence context can be quite subtle. "'Battered women . . . may perceive danger and imminence differently from men . . . A subtle gesture or a new method of abuse, insignificant to another person, may create a reasonable fear in a battered woman.'" *People v. Romero*, 13 Cal. Rptr. 2d 332, 338 (Cal. Ct. App. 1992) (citation omitted). *See also* Lynn Hecht Schafran, *Why Empirical Data Must Inform Practice, in Violence Against Women: Law and Litigation* 1-58 (Frazee, Noel & Brenneke eds., 1997) (sending roses may be a message of intimidation to a victim who has made clear she wants no contact). Batterers do not need to engage in overt conduct to

The second scenario above (where defendant engages in intimidation but does not clearly express an intent to dissuade victim from testifying) poses the question of the extent to which an intent to interfere with testimony must be proven. The Federal Rule of Evidence regarding forfeiture and most state analogues expressly require proof of intent. *See* Fed. R. Evid. 804(b)(6) (requiring that the party has "engaged or acquiesced in wrongdoing that was *intended* to, and did, procure the unavailability of the declarant as a witness") (emphasis added). *See United States v. Gray*, 405 F.3d 227, 242 & n.9 (4th Cir.) (emphasizing intent requirement), *cert. denied*, 126 S. Ct. 275 (2005); *United States v. Dhinsa*, 243 F.3d 635, 653 (2d Cir. 2001) (reciting language of Rule 804(b)(6)); *People v. Melchor*, No. 1-03-3036, 2005 Ill. App. LEXIS 1123, at *40 (Ill. App. Ct. Nov. 14, 2005) (finding that a majority of the states require intent or motivation). Such an intent requirement may preclude application of forfeiture in many domestic violence cases, where abuse, harassment, or even sweet-talking causes a victim to recant or withdraw, but the defendant's intent to interfere with her testimony cannot be proven. *But cf. United States v. Garcia-Meza*, 403 F.3d 364, 370 (6th Cir. 2005) (holding that although Rule 804(b)(6) may require intent, the Sixth

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exert power over their victims. *See, e.g.*, App. 71a, Letter 23 (just seeing her abuser made the victim "shak[e] uncontrollably"); App. 56a, Letter 9 ("every time she sees her boyfriend, or even a photo, she relives both the rape and the battering"); App. 68a, Letter 20 ("While a true weapon such as a knife, or a gun may be used as part of the package, the look, the voice, or the words of the abuser serve as just as much a fear stimulator."). There is no assurance that a court will recognize that conduct that may appear innocuous to the outside eye was responsible for a victim's disappearance.

Amendment does not); *Gonzalez v. State*, 155 S.W.3d 603, 611 (Tex. Ct. App. 2004).[19]

Finally, category (iii) above represents the many domestic violence cases where there is no evidence of post-arrest interference with a witness, but the victim is unwilling or unable to testify because of the history of abuse—that history makes testifying in front of the defendant too terrifying or traumatizing. *See* pp. 12-13, *supra*. *See e.g.*, App. 63a, Letter 18; App. 63a, Letter 19. In such cases it is unlikely that the requirement that defendant's wrongdoing must be intended to prevent the witness from testifying, could be met.[20]

Few courts have addressed this precise issue, but at least one has noted that a "mere" history of domestic violence may be insufficient to merit forfeiture. *United States v. Montague*,

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[19] A related question is whether the prosecution may rely on the wrongdoing that constitutes the basis for the criminal charge, to show wrongdoing for purposes of a forfeiture claim. Many courts have held in homicide cases, that it may. *See, e.g., Garcia-Meza*, 403 F.3d at 370; *Gray*, 405 F.3d at 243. However, at least one court has held otherwise. *United States v. Mikos*, No. 02 CR 137-1, 2004 U.S. Dist. LEXIS 13650, at *16 (N.D. Ill. July 16, 2004) (describing reliance on evidence related to charge to prove wrongdoing pretrial, a "slippery slope" which opens a "very real possibility of someday substantially eroding the defendant's right to be presumed innocent"). This too will be an issue in domestic violence cases, where the prior history of abuse is often not known to the prosecution.

[20] It is not uncommon for domestic abusers to threaten their victims that they will kill them if they call the police, etc., *see* App. 39a, Letter 1, and such pre-arrest threats might well be considered in a forfeiture hearing. However, in many cases, especially if the victim is avoiding the prosecution, the prosecutors may not have information about these specific past threats. Moreover, a strict construction of the intent requirement described above would preclude consideration of pre-arrest conduct which by definition could not be aimed at interfering with these particular charges.

421 F.3d 1099, 1104 (10th Cir. 2005) (stating that "evidence of [the defendant's] pre-prosecution conduct [alone] may be insufficient to warrant application of the wrongdoing/ forfeiture exception" but upholding relevance of past relationship to wrongdoing determination). *See also* Myrna Raeder, *Remember the Ladies and the Children Too*: Crawford's *Impact on Domestic Violence and Child Abuse Cases*, 71 Brook. L. Rev. 311, 361 (2005) ("forfeiture cannot be assumed without specific evidence linking a defendant to a complainant's failure to testify at trial"). *But cf. People v. Santiago*, No. 2725-02, 2003 N.Y. Misc. LEXIS 829, at **45, 52 (N.Y. Sup. Ct. Apr. 7, 2003) ("it is hard to conceive that [forfeiture] should be limited to situations in which the misconduct occurred between the date of the charge and the date of the trial"); Adam M. Krischer, *"Though Justice May Be Blind, It is Not Stupid": Applying Common Sense to Crawford v. Washington in Domestic Violence Cases*, 1 The Voice 1, 3 (Nov. 2004), *available at* http://www.ndaa-apri.org/pdf/the_voice_vol_1_issue_1.pdf (arguing that the right to confrontation should be waived if the victim "is so traumatized or so threatened by the defendant that she refuses to cooperate from the start of the investigation" such that "the defendant has no need to commit any act to secure the victim's unavailability outside of the charged conduct itself").

The forfeiture doctrine, while in principle applicable, in practice may be incapable of adequately remedying the inherent pressures against victims' testimony in many domestic violence cases.

### D. A Broad Interpretation of "Testimonial" Will Compel Prosecutors to Sanction Victims.

In addition to subjecting victims to increased pressure and coercion from batterers, increased reliance on victims' testimony may intensify prosecutors' use of coercive and

punitive measures to force victims to cooperate. Prosecutors generally make every effort to obtain the assistance of the victim-witness in domestic violence cases. While committed prosecutors must utilize evidence-based prosecution in order to effectively address domestic violence, no good prosecutor seeks to prosecute without the victim's testimony. *See, e.g.*, App. 78a, Letter 31 ("I had a meeting with the D.A. and it was explained to me that I did not have to testify however it would make the case much stronger if I did."); App. 35a, WCADV Statement of Interest (local prosecutors won't bring case "if the victim won't testify, even if there is strong evidence that a crime was committed"). In fact, even before *Crawford*, prosecutors all too often have considered victim participation so essential as to justify using coercive or punitive measures to ensure testimony. Gwinn & O'Dell, *supra*, at 313 (prosecutors' attempts to deal with victims who do not appear in court have "resulted in significant numbers of victims being arrested and incarcerated while their abusers have avoided jail time altogether"); *see* John Riley, *Spouse-Abuse Victim Jailed After No-Drop Policy Invoked*, Nat'l L.J., Aug. 22, 1983, at 4 (battered woman who refused to testify against her husband under Anchorage, Alaska's no-drop policy was jailed overnight for her refusal to cooperate with the prosecution);[21] App. 61a, Letter 15; App. 62a, Letter 17.

Recently in Kansas, an alleged rape victim spent three nights in jail because she refused to testify against her attacker. *See Alleged Rape Victim Refuses to Testify, Spends Three Nights in Jail*, Topeka Metro News, Feb. 23, 2005, at 1. When one advocate told the state's attorney that her client

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[21] *See also* Hanna, *supra*, at 1910 ("A victim who wants to drop charges in Alexandria, Virginia must appear on the day that trial is scheduled to discuss the case with the prosecuting attorney. Victims are advised that if they do not appear, a judge may assess court costs against them.").

did not wish to testify, the prosecutor told the victim that she could be subpoenaed and if she did not show up at trial she could be arrested. *See* App. 61a, Letter 15. Another advocate reports that several counties in California issue warrants for victims who refuse to testify. *See* App. 62a, Letter 17. Victims of domestic violence in Nassau County, New York are threatened with arrest or sanctions if they are unwilling to testify. *See* App. 21a, Nassau County Coalition Against Domestic Violence Statement of Interest. There, the District Attorney issues subpoenas and warrants for their arrest if victims fail to appear, even for an interview. *See also* Robert Tharp, *supra*, at 1A. These tactics have not escaped judicial notice. *E.g.*, *Fowler v. Indiana*, 809 N.E.2d 960, 965 (Ind. Ct. App. 2004) (expressing concern with officer's threats to compel testimony and cautioning against placing victims "in the situation of being intimidated not only by the aggressor, but also by the State"), *vacated*, 829 N.E.2d 459, 462 (Ind. 2005).

Battered women, already terrorized by their abusers, should not be forced to endure additional threats or punishment from the prosecutor to whom they turn in their search for safety. A broad interpretation of "testimonial" statements that results in mandated victim participation will too often compel prosecutors to this result, leading to the re-victimization of the victims by the very system designed to protect them.

## IV. A NARROW INTERPRETATION OF "TESTIMONIAL" IS CONSISTENT WITH THE FRAMERS' INTENT.

The *Crawford* Court acknowledged that a historical reading of the Confrontation Clause would preclude, at the least, admission of "formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions," *Crawford*, 541 U.S. at 51, and modern police "interrogations." *Id.* A narrow definition of "interrogation,"

limited to the "colloquial" understanding of a coercive, formal, and structured environment, *cf.* Brief of *Amicus Curiae* National District Attorneys Association in Support of Respondents at 22-23, is fully consistent with the original intent of the Clause, and is necessary to ensure that it is not expanded in ways that will undermine its original purpose.

As explained in *Crawford*, the Framers' concern was with the unfair use of the State's power against relatively powerless defendants. *Id.* at 56 n.7 (focusing on "prosecutorial abuse"). Specifically, the Framers sought to address the State's practice of denying defendants their right to cross-examination, by enshrining that right in the Confrontation Clause. Yet in cases such as those before the Court, defendants do not actually seek to cross-examine the victims; if they did, they would be free to use their right of Compulsory Process to compel the victims' testimony. U.S. Const. amend. VI.

In these cases, the problem is not an abuse of power by the State, because the State has long *refused* to prosecute domestic violence, has only erratically treated it as a crime, and has only reluctantly come to devote significant efforts to rectifying it. Rather, the problem is a defendant who seeks to *prevent the witness from testifying* and a State that seeks to bring her to court. The absence of a live witness in this situation is not something for which the State should be penalized.

Petitioners' extremely broad reading of the Confrontation right would suppress the truth-seeking mission of the adversary process. *See Taylor*, 484 U.S. at 410-11 (neither side intended to exercise control over the other in the truth-seeking process). It would place the State's ability to prosecute a scourge that occupies a substantial portion of today's criminal justice dockets almost entirely at the whim of defendants (or the extraordinary bravery of their victims). The history and language of the Confrontation Clause support

instead a moderate application which maintains the "the closest possible fit" between the Clause and its original purpose and scope. *Cf. United States v. Patane*, 542 U.S. 630, 641 (2004) (limiting expansion of *Miranda* rule).

## CONCLUSION

For the foregoing reasons, the judgments in *Davis* (05-5224) and *Hammon* (05-5705) should be AFFIRMED.

Respectfully submitted,

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## APPENDIX A

## INTEREST OF *AMICI CURIAE*

The following organizations respectfully submit this brief as *Amici Curiae* in support of the Respondents, and urge the Court to affirm the decisions of the Supreme Court of Indiana and the Supreme Court of Washington.

The **National Network to End Domestic Violence (NNEDV)** is a not-for-profit organization incorporated in the District of Columbia in 1995 (www.nnedv.org). The mission of NNEDV is to create a social, political and economic environment in which violence against women no longer exists. A network of state domestic violence coalitions, representing over 2,000 member programs nationally, NNEDV serves as the voice of battered women and their children and those who provide direct services to them. NNEDV has a long history of working at the state, local and national level to promote a strong criminal justice response to domestic violence. NNEDV works with states and local communities to implement best practices in the prosecution of domestic violence cases. NNEDV member organizations provide training for law enforcement officers and prosecutors about domestic violence and the needs of victims. NNEDV member organizations have been involved in the reform of state laws addressing domestic violence for more than two decades. Along with local, state and national leaders in domestic violence and criminal justice issues, NNEDV continues to formulate new approaches and innovative legal solutions to ending domestic violence. NNEDV was instrumental to Congressional enactment and eventual implementation of the Violence Against Women Acts of 1994, 2000 and 2005.

The **National Network to End Domestic Violence Fund (NNEDV Fund)** is a not-for-profit organization

incorporated in the District of Columbia in 1996 for the purposes of providing technical assistance, training and public education to advocates, professionals and individuals who encountered battered women in their work and communities. NNEDV Fund has provided advice and expertise on domestic violence issues affecting battered women and their children to judges, attorneys, educators and state and local welfare, justice system personnel, and others working to end domestic violence. NNEDV Fund provides technical assistance to states as they work with police, judges and prosecutors to enforce protection orders. NNEDV Fund also collaborates with state and national domestic violence, law enforcement and other criminal justice organizations to provide training, outreach and standards for protection orders. NNEDV Fund is the leading national voice on the criminal justice response to victims of domestic violence.

The **Indiana Coalition Against Domestic Violence (ICADV)** is committed to the elimination of domestic violence through: providing public awareness and education; advocating for systemic and societal change; influencing public policy and allocation of resources; educating and strengthening coalition members; and, promoting the availability of comprehensive services.

ICADV believes that violence is endemic to our society. We believe patriarchal values and attitudes support and perpetuate violence and we seek to confront the roots of that violence within ourselves and within larger economic, social and political systems. We believe that no human being deserves to be beaten or violated by another. We believe in the right of all persons to live without fear, oppression, or sexual, emotional or physical abuse. We believe domestic violence is the use of force or threat to achieve and maintain control over others in personal relationships. *Evidence based prosecutions are critical in analyzing the legal issues absent the interpersonal relationship of the parties. If the victim*

*must participate to successfully pursue criminal prosecution against the alleged batterer, then that batterer has the ability to influence the very prosecution itself.* We believe batterers should be held accountable for their actions. We believe in inclusiveness and respect for diversity. Our goal is to empower individuals to achieve self-determination. We are committed to the ideas and practices of a supportive, non-competitive atmosphere in ICADV, which fosters open communications, respect and cooperation among all members of the coalition. We believe the elimination of domestic violence is best achieved by utilizing a multi-faceted approach, *including the use of evidence based prosecution.* We believe that while the majority of victims of domestic violence are women and children, everyone is affected by it and the solution involves everyone.

The **Washington State Coalition Against Domestic Violence (WSCADV)** is a non-profit organization, incorporated in the state of Washington. Founded in 1990 by domestic violence survivors, WSCADV is a statewide membership organization that organized to share resources, develop common strategies and strengthen community responses to domestic violence in Washington State. WSCADV's core commitment of the WSCADV is to support domestic violence survivors, and emergency shelter and advocacy programs by advocating for laws and public policies that promote safety and justice for domestic violence victims.

WSCADV conducts statewide trainings for law enforcement officers and prosecutors about domestic violence and the needs of victims, and assists local communities to implement best practices in the investigation and prosecution of domestic violence cases.

**Legal Momentum** advances the rights of women and girls by using the power of the law and creating innovative

public policy. Legal Momentum is dedicated to working to end violence against women. Legal Momentum was one of the lead advocates for the landmark Violence Against Women Act and its reauthorizations, which seek to redress the historical inadequacy of the justice system's response to domestic violence. Legal Momentum also represents victims of domestic violence who suffer housing and employment discrimination related to the violence. Legal Momentum is concerned that adoption of a broad definition of "testimonial" would foreclose the possibility of evidence-based prosecution and thus ensure that violent criminals go unpunished and victims are without protection of the law.

The **Domestic Violence Legal Empowerment and Appeals Project (DV LEAP)** is a national non-profit organization dedicated to filling a vacuum in legal advocacy for battered women and children by providing expert *pro bono* representation in domestic violence appeals. DV LEAP is a partnership of the National Network to End Domestic Violence, George Washington University Law School, and a network of participating law firms, and is directed by one of the nation's leading domestic violence advocates.

The **Alabama Coalition Against Domestic Violence (ACADV)** is a nongovernmental, nonprofit organization that speaks on behalf of all Alabama domestic violence shelters and has been a leader in education, policy reform and advocacy. ACADV also operates a 24-hour statewide hotline for domestic violence. ACADV has a long history of collaboration at the state and local level. Staff and member programs work in partnership with the Alabama Legislature to pass laws that protect victims of domestic violence and hold perpetrators accountable. ACADV provides training and technical assistance to thousands of professionals around the state to promote an effective criminal justice response to domestic violence.

The **Arizona Coalition Against Domestic Violence (AzCADV)** is a not-for-profit organization incorporated in 1980 (azcadv.org). The mission of AzCADV is to lead, to advocate, to educate, to collaborate, to end domestic violence in Arizona. AzCADV is a coalition of 129 members who are domestic violence service providers, individuals, students, task forces and survivors. As a long term advocate for domestic violence victims in Arizona, the Coalition collaborates with state, local and national efforts to promote a strong criminal justice response to domestic violence. AzCADV works with states and local communities to implement best practices in the prosecution of domestic violence cases. The Coalition also works with the Arizona Peace Officer Standards and Training Board to provide training for law enforcement officers and prosecutors about domestic violence and the needs of victims. AzCADV and its member organizations have been involved in the reform of state laws addressing domestic violence for more than two decades. Along with local, state and national leaders in domestic violence and criminal justice issues, AzCADV continues to formulate new approaches and innovative legal solutions to ending domestic violence. AzCADV and its members were instrumental to Congressional enactment and eventual implementation of the Violence Against Women Acts of 1994, 2000 and 2005.

The mission of **Break the Cycle** is to engage, educate and empower youth to build lives and communities free from dating and domestic violence. Founded in 1996, Break the Cycle is the nation's first organization to provide law-based domestic violence services exclusively to young people, ages 12 to 24. Our domestic violence prevention and early intervention services include education and outreach, peer leadership opportunities and comprehensive, free legal services for young victims of abuse. Break the Cycle works on both a national and local level to provide youth with resources they need to end domestic violence. Since our

inception, Break the Cycle has directly served more than 65,000 youth across the nation.

Our 10 years of experience working with abused youth throughout the country guide our support of this brief. Girls and women between the ages of 16 and 24 are the most vulnerable to domestic violence, experiencing the highest per capita rates of non-fatal intimate partner violence. According to these statistics, Break the Cycle deals with the most threatened or all female domestic violence victims. For this reason, we are in a unique position to understand the significant importance of evidence-based prosecution in domestic violence cases.

There are several obstacles unique to the 12 to 24 age group that greatly increases the difficulty of seeking prosecution in domestic violence cases. On occasion, there are situations where abusers victimize our clients sexually and physically. Often there are children born into these relationships and it may not be in the victim's best interest to prosecute the case. If the client is a woman, she may be in danger from the abuser and/or his friends and his family. A number of our clients have abusers who are even gang members and the client's safety is greatly threatened by testifying against the abuser. If prosecution could go forward without the victim being involved, it would decrease the pressure on victims to testify and would assist prosecutors with cases that they might otherwise not be able to prosecute.

The **California Partnership to End Domestic Violence (CPEDV)** is the federally recognized statewide domestic violence coalition for California. Its members include approximately one hundred domestic violence service organizations, supportive organizations, survivors of domestic violence, and other concerned individuals. CPEDV works to end domestic violence through public education, partner-

ships, advocacy, public policy, and direct services and is member driven.

CPEDV was formed in 2005 out of a merger of two former entities, the California Alliance Against Domestic Violence (CAADV) and the Statewide California Coalition for Battered Women (SCCBW). CAADV has filed several amicus briefs with the California Supreme Court. These included a brief filed in *People v. Cornell Brown*, 33 Cal.4th 892 (Cal. 2004), in which the issue on appeal was the admissibility of expert witness testimony where the alleged victim of domestic violence partially recanted at trial.

In December 2005, CPEDV filed an amicus brief in *People v. Giles*, to be heard in the California Supreme Court in 2006. This case deals with the admissibility of a statement by a victim of a domestic violence homicide made to police on a previous occasion and implicating the defendant. The defendant argued on appeal that the admission of this statement violated his Sixth Amendment right to confrontation. However, the appellate court ruled that it was admissible under the rule of forfeiture, which Justice Scalia stated in Crawford is an exception to the right of confrontation. CPEDV's brief emphasized the deleterious effect on domestic violence prosecutions which would ensue if courts were not allowed to admit such statements when victims are not available to testify, through intimidation or death.

The **Colorado Coalition Against Domestic Violence (CCADV)** is a statewide membership organization. CCADV was established in 1978 by twelve domestic violence service providers in order to provide a strong statewide voice for survivors of domestic violence, their families, and providers of service. As the statewide voice for survivors, CCADV represents over 80 domestic violence shelters, resource centers, allied organizations and individuals. Through commu-

nity education, networking and the empowerment of battered women and children, CCADV provides a system of comprehensive services that support member programs' ability to effectively serve diverse survivors of domestic violence (over 40,000 individuals each year). One of the central goals of CCADV is to enhance criminal justice response to domestic violence in Colorado. Recognizing that many victims of domestic violence do not access the criminal justice system for fear of retaliation, CCADV supports practices that facilitate offender accountability while maintaining victim safety. Since domestic violence victims are most vulnerable to an assault when they attempt to leave or sever the relationship with the defendant, victims may refuse to testify in court against their abusers. In these instances, CCADV recognizes the importance of evidence-based prosecution to ensure that offenders can be held accountable even without a domestic violence victim's in-court testimony.

**CORA (Community Overcoming Relationship Abuse)** is a nonprofit organization directed at ending domestic violence/abuse in San Mateo County, California (www.corasupport.org). CORA provides free and confidential services to victims and survivors of domestic/dating violence and abuse. Our services include a 24-hour hotline, support groups, legal services, emergency and transitional housing, and more, in English, Spanish and Tagalog. CORA is a multicultural agency committed to serving victims/survivors of domestic violence/abuse, regardless of age, ethnicity/race, financial status, language, sexual orientation, immigration status, class, religion, gender, mental or physical ability.

The **Connecticut Coalition Against Domestic Violence, Inc. (CCADV)** was founded in 1978 as the "Battered Women's Task Force" and incorporated in 1986, as a vehicle for community-based domestic violence shelter programs to provide statewide public policy advocacy,

legislative reform, and education on the issue of domestic violence. CCADV is a membership organization whose purpose is to work together to end domestic violence by changing the social conditions, beliefs and social actions that perpetuate abuse against women and children. There are eighteen domestic violence shelter programs in Connecticut and all are members in good standing of CCADV. Over the years as the needs of battered women and their children have changed, the eighteen domestic violence shelter programs have expanded the types of advocacy and services offered to meet these changing needs. The Coalition's focus is to provide training, education and technical assistance to its member programs in order to ensure quality and consistent services throughout the State of Connecticut.

CCADV was a member of the 1986 Governor's Task Force on Family Violence and the 1997 Task Force to Study the Issue of Domestic Violence, which was created pursuant to Public Act 96-245. In 1986, CCADV successfully worked to ensure passage of Connecticut's Family Violence Prevention and Response Act (FVPRA), still considered one of the most comprehensive family violence statutes in the country.

The **Delaware Coalition Against Domestic Violence** is a statewide non profit organization, incorporated in the State of Delaware in 1994 (www.dcadv.org), comprised of domestic violence agencies, allied organizations and supportive individuals. The mission of DCADV is to eliminate domestic violence through: acting as an educational and informational resource to our member agencies and the community; advocating for domestic violence concerns in Delaware and providing a strong, unified statewide voice for victims of domestic violence and their children, domestic violence programs, and victim service providers.

For the past twelve years, DCADV has worked at both the state and local levels to help ensure that the policies and practices of Delaware's civil and criminal justice systems serve the interests of battered women and their children. Through our work with domestic violence shelter and advocacy programs, and our Survivors Task Force, we serve as a voice for both survivors of domestic violence and the programs that serve them. DCADV provides training and technical support to the Delaware Department of Justice as well as local and state law enforcement agencies and participates on numerous committees and task forces that identify and, hopefully resolve problems within our social and legal institutions. Much work has been done to encourage prosecutors and law enforcement officers in our state to take domestic violence seriously and to respect the rights of battered women who may be afraid to testify against their abusers and to carefully collect evidence that will enable the Court to prosecute domestic violence cases, even if the victim is not able to participate. These efforts are informed by both research on best practices and the knowledge and expertise of other state coalition and national organizations such as the National Network to End Domestic Violence. DCADV is also actively involved in reforming state and local laws to better address the needs and protect the rights of battered women who live and/or work in Delaware. Moreover, DCADV continues to work in partnership with state and national leaders to help formulate new approaches and innovative legal solutions to ending domestic violence.

The **District of Columbia Coalition Against Domestic Violence (DCCADV)** is a not-for-profit organization incorporated in the District of Columbia in 1986 (www.dccadv.org). The mission of the DCCADV is two-fold: 1) to eradicate all types of relationship violence including: domestic violence, spousal rape, sexual assault, stalking, mental and emotional abuse, and acquaintance rape through the coordinated mobilization of efforts to effect systemic

social change; and 2) to build a city wide response in the District and surrounding jurisdictions in partnership with the community, providers, and concerned others to more effectively ensure the safety, security, and justice needs of those living with violence and abuse. DCCADV pursues these goals through its focus on advocacy, public education, public policy, technical assistance and training, resources, research and direct services. The DCCADV serves as the voice of battered women and their children and those who provide direct services to them. DCCADV has a long history of working at state and local levels to promote a strong criminal justice response to domestic violence. DCCADV works with the community to implement best practices in the prosecution of domestic violence cases. DCCADV provides training for law enforcement officers and prosecutors about domestic violence and the needs of victims. DCCADV has been involved in the reform of local laws addressing domestic violence for more than a decade. Along with governmental agencies and not for profit direct service providers in domestic violence and criminal justice issues, DCCADV continues to formulate new approaches and innovative legal solutions to ending domestic violence.

Therefore, DCCADV understands and advocates for evidence-based prosecution in domestic violence cases and is committed to joining the amicus brief(s) prepared by the National Network to End Domestic Violence addressing this issue.

The **Florida Coalition Against Domestic Violence (FCADV)** is the statewide nonprofit advocacy and public policy organization for Florida's 41 certified domestic violence centers which provide shelter and other services to domestic violence, dating violence, sexual violence and stalking victims in Florida's 67 counties. In 1977, 14 shelters in Florida formed a network of battered women's advocates known as the Refuge Information Network. Several years

later this organization was incorporated as FCADV. This organization was founded on principles of cooperation and unity among shelters. FCADV's mission is to create a violence-free world by empowering women and children through the elimination of personal and institutional violence and oppression against all people. FCADV provides leadership, advocacy, education, training, technical assistance, public policy and development, and support to domestic violence center programs.

The **Georgetown University Law Center Domestic Violence Clinic** is a clinical legal education program in which law students have represented victims of domestic violence in civil protection order cases since 1983. Each year, the Clinic provides legal representation to approximately 60 clients in the D.C. Superior Court, and provides legal counseling to another 100 local victims of family abuse. In addition, until September, 2000, the Clinic administered the Emergency Domestic Relations Project, which provided a wide range of legal services to more than 50,000 low-income, unrepresented victims of domestic violence over the past 21 years. Project personnel train local attorneys in domestic violence law, refer indigent victims to them for pro bono representation, and mentor them through their first cases.

The **Georgia Coalition Against Domestic Violence** is a non-profit organization representing domestic violence programs and individual battered and formerly battered women. The mission of the Georgia Coalition Against Domestic Violence (GCADV) is to support its member programs to achieve safety and justice for domestic violence victims. GCADV is a coalition of domestic violence programs from around the state of Georgia. GCADV has extensive expertise on the physical, emotional and economic dangers domestic violence victims and their families face when they stand up to their batterers in a court of law. We work closely with courts, legislators, the police, prosecutors,

and the media in providing a more effective net of protection for battered women. We provide training and technical assistance to our member programs, the police, courts and legislators.

We have seen first-hand the effects of low prosecution rates on the escalation of battering behavior. We have worked with many victims who are unable to follow through with the extensive and prohibitive prosecution process due to safety concerns, interference with job security (which impacts economic stability), and the emotional trauma of prosecuting their current or former partners. Yet we are clear that prosecuting batterers is currently the only control the system has to deescalate a batterer's violence. Without evidence based prosecution, many batterers will continue their violence with current and/or future partners.

**Hawaii State Coalition Against Domestic Violence (HSCADV)**, a private, not-for-profit, statewide coalition, was formed in 1980. It is comprised of the majority of the directors of the spouse abuse shelters and counseling programs for victims and perpetrators of partner abuse on each of the islands, as well as the Victim Witness Assistance Division of the Honolulu Prosecutor's Office, the Domestic Violence Clearinghouse and Legal Hotline, the Legal Aid Society of Hawaii, and Na Loio Immigrant Rights and Legal Center. The HSCADV currently has twenty-five agency/ program members.

The HSCADV conducts activities to promote domestic violence intervention and prevention and to increase public awareness of domestic violence issues. The purpose of the Coalition is to coordinate efforts to end family violence in Hawaii. The HSCADV provides: coordination of services, community education and training on family violence, planning and technical assistance on family violence matters to domestic violence programs and agencies, and facilitation

upon request. The HSCADV also collects resource materials and serves as a clearinghouse for domestic violence information and resource materials. The HSCADV collaborates with other coalitions, groups and individuals from both the private and public sectors on a variety of projects.

The **Idaho Coalition Against Sexual & Domestic Violence** is a not-for-profit organization incorporated in Idaho in 1980. The mission of the Idaho Coalition Against Sexual & Domestic Violence is to provide education, assistance, and support to individuals, programs, and organizations dedicated to ending sexual assault and domestic violence. A network of state domestic violence and sexual assault victim services programs, law enforcement, prosecutors, and other service providers, the Idaho Coalition serves as the statewide voice of victims of sexual assault, dating violence, domestic violence and stalking. Victims of domestic violence in Idaho who testify against the alleged abuser in criminal court are subject to increased danger, coercion, and trauma. Victimless prosecutions have taken place in order to protect the safety of the victims. Curtailing victimless prosecutions would endanger Idaho's ability to prosecute domestic violence, thereby further endangering a population already greatly at risk.

The **Illinois Coalition Against Domestic Violence (ICADV)** is a non-profit organization, incorporated in the State of Illinois. Founded in 1978, ICADV is a statewide membership organization of local domestic violence programs and individuals committed to ending domestic violence. The mission of the ICADV is to eliminate domestic violence by changing societal attitudes, practices and policies about women from diverse groups, their children and violence through education, advocacy and social action. To that end member programs provides services annually to over 50,000 adults and children.

The ICADV is the only statewide organization in Illinois that provides training and technical assistance on domestic violence issues for battered women's advocates, other professionals and community lay people. ICADV actively promotes public policy to protect victims of domestic violence and their children and to hold perpetrators accountable for their violent behavior. ICADV participates actively in training law enforcement officers, probation officers, prosecutors, lawyers and the judiciary on Illinois statutes and federal statutes regarding violence against women and children. ICADV encourages prosecution of domestic assaults as a means to decrease domestic violence homicides. However, prosecution is difficult because victims are afraid of the perpetrators and perpetrators commonly threaten the victim with retaliation for any cooperation they give to the court. ICADV promotes collection of evidence and prosecution wherever possible using witnesses other than the victim.

The **Iowa Coalition Against Domestic Violence (ICADV)** is a non-profit organization, incorporated in the state of Iowa in 1985. ICADV provides educational and technical assistance to the domestic violence programs across Iowa, and also acts on a statewide and national level to promote public policy and legislative issues on behalf of battered women and their children. ICADV's purpose is to eliminate personal and institutional violence against women through support to programs providing safety and services to battered women and their children. ICADV recognizes that unequal power contributes to violence against women. Therefore, ICADV advocates social change, legal and judicial reform, and the end to all oppression.

**Jane Doe Inc. (JDI)** is the Massachusetts Coalition Against Sexual Assault and Domestic Violence. JDI is a statewide membership organization of over 60 domestic violence programs and rape crisis centers. The mission of

JDI is to bring together organizations and people committed to ending domestic violence and sexual assault. We advocate for responsive public policy, raise awareness, and provide technical assistance and support to our member organizations who provide comprehensive prevention and intervention services. In keeping with its mission, JDI has an interest in removing barriers that limit or deny a domestic violence survivor's access to justice and support services. Over the last twenty-eight years we have worked with police and prosecutors to use reliable hearsay exceptions as a best practice in the prosecution of domestic violence cases. This practice has resulted in a substantial increase in the numbers of victims and their children who were further protected from harm.

The **Kansas Coalition Against Sexual and Domestic Violence (KCSDV)** is a non-profit organization representing domestic violence and sexual assault programs and individual battered and formerly battered women and victims of sexual violence. KCSDV has extensive expertise on the physical, emotional and economic dangers women and their families face when they challenge their batterers and perpetrators in a court of law. This organization and its member programs work closely with courts, legislators, law enforcement agencies, prosecutors, and the media across the state to provide a more effective network that will protect battered women and sexual assault victims seeking help through a court proceeding.

The **Kentucky Domestic Violence Association (KDVA)** is a non-profit organization that provides training, technical assistance and support services to Kentucky's sixteen domestic violence shelter programs. These programs help thousands of victims of domestic violence and their children each year through shelter, education, counseling, casework and advocacy. The mission of KDVA is to ensure that the right to live free of any form of domestic abuse is

valued, protected and defended in the Commonwealth of Kentucky. Given the real complexities victims of domestic violence must face while attempting to survive and/or exit a domestic violence relationship, and given the critical need for perpetrators of domestic violence to be held accountable for their actions, KDVA recognizes the importance of evidence-based prosecutions in domestic violence cases.

The **Legal Aid Society of Northwest North Carolina, Inc. (LAS)** is a not-for-profit organization incorporated in North Carolina. We were incorporated in 1962 and are the oldest civil legal services agency in North Carolina. The mission of LAS is to provide equal access to the civil justice system for low income people in our six county service area. In 1996, in collaboration with many community partners, the Legal Aid Society began our Domestic Violence Advocacy Center to improve the representation of victims of domestic violence in civil protective order hearings in Forsyth County. In 2002 we expanded DVAC to provide services to all six counties in our service area including Forsyth, Surry, Stoke, Davie Yadkin and Iredell Counties. As a part of our work to end domestic violence in the lives of our clients, and in our community we work very closely with our community collaborative which includes representatives from our district attorney's Office, sheriff's department, police departments, Family Services, Inc. health care providers, our local Department of Social Services among others. We also work with statewide collaborative to improve the social and legal responses to domestic violence in our state.

The **Maine Coalition to End Domestic Violence (MCEDV)** is a not-for-profit organization incorporated in the state of Maine in 1977 (www.mcedv.org). The mission of MCEDV is to create a social, political and economic environment in which violence against women no longer exists. A coalition of the nine Maine domestic violence

organizations, MCEDV serves as the statewide voice of battered women and their children and those who provide direct services to them. MCEDV has a long history of working at the state and local level to promote a strong criminal justice response to domestic violence. MCEDV works with state agencies and local communities to implement best practices in the prosecution of domestic violence cases. MCEDV and its member organizations provide training for law enforcement officers and prosecutors about domestic violence and the needs of victims. MCEDV and its member organizations have been involved in the reform of state laws addressing domestic violence for more than two decades. Along with local, state and national leaders in domestic violence and criminal justice issues, MCEDV continues to formulate new approaches and innovative legal solutions to ending domestic violence.

The **Maryland Network Against Domestic Violence (MNADV)** has been working since 1980 to eliminate domestic violence in Maryland through *education, training, and advocacy*. As Maryland's state coalition, the Network works together with local domestic violence programs as well as criminal justice and law enforcement personnel, legal advocates, health care and social service providers, clergy, educators, businesses, community groups, and concerned individuals to *promote a coordinated community response to end domestic violence*. MNADV provides a statewide helpline, website, numerous publications; offers professional training and information to a broad range of service providers on a variety of topics through conferences and specialized workshops; develops model policies, protocols, and standards; provides legislative, public policy and systems advocacy; collaborates with local, state, and national organizations; sponsors an annual awards dinner, Memorial Service, and public education activities.

The **Michigan Coalition Against Domestic and Sexual Violence (MCADSV)** is a not-for-profit organization incorporated in the State of Michigan for the purpose of providing services and advocacy on behalf of the victims of sexual assault and domestic violence and their minor children. MCADSV is a membership organization of over 50 domestic violence and sexual assault service provider agencies, as well as other supportive agencies and individuals, committed to ending domestic and sexual violence. For over twenty-five years, MCADSV has provided training, technical assistance and policy consultation to victim services programs, the bar, the courts, law enforcement agencies, governmental bodies and others on the issue of domestic violence and sexual assault.

The **Minnesota Coalition for Battered Women, Inc. (MCBW)** is a private, non-profit membership organization which serves as a statewide coalition with approximately one hundred local, regional and statewide grassroots organizations which provide shelter and services to battered women and their families. MCBW provides training and technical assistance for member programs, networking and support for battered women and community education to law enforcement, schools and the general public. The member organizations of MCBW, with consultation and assistance provided by the Coalition, provide shelter and lay advocacy every year to thousands of battered women. MCBW, both directly and in collaboration with member programs, works with law enforcement and prosecutors to provide safety for battered women and their children.

**Missouri Coalition Against Domestic Violence (MCADV)**, is a non-profit membership organization, incorporated in 1980, of 91 Missouri programs that provide services to those who have been victimized by domestic violence. MCADV has extensive expertise addressing the physical, emotional, and economic dangers survivors and

their families experience in courts of law when seeking safety and protection, as well as accountability, from their abusers. MCADV works closely with courts, legislators, law enforcement, prosecuting attorneys, and a wide variety of community service programs and institutions to provide education, public policy, and adequate and reasonable procedures to achieve effective protections for abused people.

MCADV is extremely concerned about the case of *Hammon* v. *Indiana* because the Court's decision will have significant implications for cases involving domestic and sexual violence in Missouri and throughout the nation. Victims of domestic and sexual violence may have legitimate concerns regarding their safety that preclude them from testifying in criminal cases brought to trial. Thus, the use of evidence-based prosecution, including the presentation of reliable hearsay, is necessary to hold the assailants accountable for their criminal behavior. A key component of evidence-based prosecution includes the ability to present statements made as excited utterances. This exception to the hearsay rule has long been recognized by the courts as a reliable form of evidence. A statement made contemporaneously with, or immediately after, a startling event provides a high degree of reliability. When jurors do not receive sufficient information about the case, juries may not hold the perpetrators accountable for their crimes. The elimination of the use of reliable hearsay evidence would result in tragic miscarriages of justice.

The **Montana Coalition Against Domestic and Sexual Violence (Montana Coalition)** is a non-profit organization representing domestic violence programs and individual battered and formerly battered women. The Montana Coaliton has extensive experience on the physical, emotional and economic dangers women and their families face when they stand up to their batterers in a court of law.

The **Nassau County Coalition Against Domestic Violence** in Nassau County, New York, provides comprehensive services that focus on the safety and well being of victims of domestic violence, and sexual assault. We also work to ensure societal accountability, improve institutional responsiveness to victims, and increase public awareness in order to prevent domestic violence, and sexual assault. Victims of domestic violence in Nassau County, New York were being threatened with arrest or sanctions if they indicated that they were unwilling to testify against their abuser. The DA's office often penalized them for their unwillingness to testify by issuing subpoenas and warrants for their arrest if they failed to appear, even for an interview with the Assistant District Attorney. When these victims were clients of our agency, we would intervene with the DA's office on their behalf, but regretfully, all too often the victim (even our clients) did not realize that we were a resource to intercede on their behalf.

The **Nebraska Domestic Violence Sexual Assault Coalition (NDVSAC)** is a non-profit statewide organization representing Nebraska's 22 domestic violence programs and individual battered and formerly battered women.

NDVSAC has extensive expertise on the physical, emotional and economic dangers women and their families face when they stand up to their batterers in a court of law. We work closely with courts, legislators, the civil and criminal justice systems, and the media in providing a more effective net of protection for battered women who ask for help. NDVSAC works with state and local prosecutors to promote a strong criminal justice response to domestic violence and to implement best practices in the prosecution of domestic violence cases, particularly when battered women are unable to take the stand to testify against abusers. NDVSAC and its member organizations provide training for

law enforcement officers and prosecutors about domestic violence and the needs of victims.

The **Nevada Network Against Domestic Violence (NNADV)** is a not-for-profit organization founded in 1980, and incorporated in the State of Nevada, to help Nevada's communities respond creatively and effectively to the needs of victims of domestic violence (www.nnadv.org). As a statewide organization, NNADV provides a resource library and technical assistance to communities and advocates. NNADV coordinates quarterly network meetings, assists in the provision of rural community education, and is active in educating legislators on issues of concern to Nevada families. In an effort to promote social change and empower women and all persons affected by domestic violence, NNADV is an inclusive network which supports member programs, communities and individuals to work on the elimination of domestic violence and the core issues of societal oppression. NNADV has a long history of working at state and local levels to promote a strong criminal justice response to domestic violence. NNADV has been working with local communities to implement best practices in the prosecution of domestic violence cases. We know, through testimony to the Nevada State Legislature, that prosecutors rely to a very great extent on the existence of 911 tapes or excited utterances when they decide whether to move forward with a domestic violence prosecution. If these types of evidence become inadmissible in court because they are "testimonial," NNADV believes that this would have detrimental impact on the prosecution of domestic violence cases in Nevada.

The **New Hampshire Coalition Against Domestic and Sexual Violence ("Coalition")** is a statewide network of fourteen independent member programs committed to ending domestic and sexual violence. Founded in 1977, the Coalition continues to ensure that high-quality services are provided to victims/survivors of domestic violence, sexual

abuse and stalking. Because the Coalition recognizes that violence and oppression are connected, we promote social change by empowering victims and by holding systems accountable for their responses to domestic and sexual violence and stalking.

Our member programs have a great deal of experience providing services to victims who cannot or choose not to testify against their abusers. The victim's reluctance stems from numerous factors including: legitimate fear of retribution, ambiguous feelings about pursuing criminal charges against their partner, and lack of information about alternative economic assistance to replace financial support from their partners. We believe that accountability for abusive partners is key to ending family violence. Therefore, NHCADSV supports evidence based prosecution and asks to have our comments added to the record.

The **New Jersey Coalition for Battered Women (NJCBW)** is a statewide coalition of domestic violence service programs and concerned individuals whose purpose and mission is to end violence in the lives of women. Incorporated in 1979, NJCBW is a private, non-profit corporation whose members include 29 domestic violence programs in New Jersey. NJCBW advocates for battered women with state level governmental and private agencies, the state legislature, judiciary and governor to support legislation and policies that will increase the safety and options of victims of domestic violence. It also provides information, resources, technical assistance and training to domestic violence programs, the public and those agencies, organizations and individuals involved with New Jersey's response to domestic violence.

NJCBW acknowledges the critical importance of evidenced based prosecution in domestic violence cases. NJCBW has many years of experience dealing with domestic violence victims who are reluctant or unable to testify in a

legal matter. The concept of evidence based prosecution grew out of the need to hold batterers accountable without a domestic violence victim's testimony or cooperation and sends a strong message that domestic violence is a serious crime against society.

The **New Mexico Coalition Against Domestic Violence (NMCADV)** is a non-profit organization representing domestic violence programs and individually battered and formerly battered women. NMCADV has expertise on the physical, emotional and economic dangers women and their families face when they stand up to their batterers in a court of law.

The **New York State Coalition Against Domestic Violence (Coalition)** is a not-for-profit membership organization whose mission is to eradicate domestic violence and to ensure the provision of effective and appropriate services to victims of domestic violence through community outreach, education, training, technical assistance and policy development. The Coalition's principles and practices prioritize the safety and concerns of women who are abused, provide support and encouragement for the participation of women who are abused in the struggle to eradicate personal and institutional violence against them, and provide for a non-competitive atmosphere that fosters open communication, respect and cooperation among advocates and women who are abused. The Coalition submits this Statement of Interest because we believe in the importance of evidence-based prosecution in domestic violence cases.

The **North Carolina Coalition Against Domestic Violence (NCCADV)** is a statewide non-profit membership organization providing support services to local domestic violence agencies and allied professionals. The mission of NCCADV is to create social change through the elimination of the institutional, cultural, and individual oppressions that contribute to domestic violence. Approximately ninety

domestic violence programs provide direct services to victims of domestic violence in all 100 counties in NC. Domestic violence crisis lines in NC received over 94,000 calls in FY 2003, and local domestic violence programs served over 45,000 victims in FY 2003. In addition, from January 1, 2002, through December 31, 2005, 295 women, children, and men have been murdered in NC as a result of domestic violence, according to information collected by our Coalition. North Carolina ranks 16th in the nation for the number of per capita homicides committed by men against women in 2003, according to the Violence Policy Center study released in September 2005. NCCADV works closely with allied professionals within the criminal justice system to enhance accountability of abusers and increase safety for victims. We provide training to law enforcement, prosecutors, magistrates, clerks and other court personnel on a statewide and local level. We are very concerned about the impact that the Court's decision in *Crawford* has had on the successful prosecution of domestic violence cases in our state. If perpetrators of domestic violence are not held accountable for their crimes, domestic violence will continue to be an epidemic in our state, and women, children, and men will continue to be murdered as a result.

The **North Dakota Council on Abused Women's Services/Coalition Against Sexual Assault in North Dakota (NDCAWS/CASAND)** is a not-for-profit organization incorporated in North Dakota since 1980. The mission of NDCAWS/CASAND is to provide leadership by facilitating local, state, and regional collaboration in the identification and prevention of domestic and sexual assault. As a network of community based domestic violence providers, NDCAWS/CASAND serves as the voice of battered women and their children and those who provide direct services to them in North Dakota. NDCAWS/CASAND has a long history of working at the state and local level to promote strong criminal justice response to domestic

violence. NDCAWS/CASAND works with providers in all 53 North Dakota counties to implement best practices in prosecution of domestic violence cases. We provide training for law enforcement officers, judges and prosecutors about domestic violence and the needs of victims. Our member organizations have been involved in helping to craft state laws addressing domestic violence since 1980. Our organization continues to work on new approaches and innovative legal solutions to ending domestic violence and sexual assault in North Dakota.

The **Ohio Domestic Violence Network (ODVN)** is a not-for-profit membership organization incorporated in the state of Ohio and is comprised of 78 domestic violence programs and 213 allied professionals representing batterers' intervention programs and other legal and social service agencies that provide services and advocacy to victims and perpetrators of domestic violence. The member agencies represent all regions of the state, including rural and urban areas. ODVN advances the principle that all people have the right to an oppression and violence free life; fosters changes in our economic, social and political system and brings leadership, expertise and best practices to community programs. ODVN seeks individual, legislative and social change, produces and shares information, and educates the public and other agencies about domestic violence and resource options. As Ohio's largest and most comprehensive resource on domestic violence, ODVN represents the interests of and works arm in arm with domestic violence agencies and victims throughout Ohio. ODVN is a member of the National Network to End Domestic Violence.

ODVN works closely with state agencies and local communities to implement best practices in the prosecution of domestic violence cases. ODVN recently revised the Ohio Model Protocol for Responding to Domestic Violence. The Model Protocol encourages prosecutors to develop procedures to evaluate domestic violence cases from a perspective

that is victim sensitive without being victim driven. Prosecutors are also encouraged to prosecute without the availability of the victim by using evidence gathered at the scene, police reports, medical and other witnesses. ODVN also provides training for law enforcement officers, prosecutors and court personnel on the dynamics of domestic violence. ODVN and its members have been involved in the reform of state laws including enactment of the preferred arrest law in 1994 and statutory bail consideration for alleged domestic violence offenders in 2005. ODVN will continue to work towards the development of strategies designed to prevent domestic violence.

The **Oklahoma Coalition Against Domestic Violence and Sexual Assault (OCADVSA)** is a not-for-profit organization incorporated in the state of Oklahoma in 1981. The purposes of OCADVSA are the elimination of domestic and sexual violence in Oklahoma; to ensure the safety of victims of domestic and sexual violence and stalking; and to hold perpetrators of the crimes of domestic violence, sexual assault and stalking accountable for their crimes. This is accomplished by creating a social and political atmosphere in which these crimes will no longer occur.

OCADVSA is the membership organization of domestic violence and sexual assault service providers that includes twenty-eight state certified and tribal victim service organizations. OCADVSA has a long and successful history of working at the state, local and national levels to promote a strong criminal justice response to domestic violence and sexual assault. OCADVSA works with allied state and local level agencies and organizations to implement the best practices in the prosecution of domestic violence and sexual assault cases. OCADVSA provides training and education for law enforcement, prosecutors and the judiciary about domestic violence and sexual assault and the needs of victims. OCADVSA has consistently been involved in the

reform of state and national laws addressing the crimes of domestic and sexual violence. OCADVSA worked with national leaders such as the National Network to End Domestic Violence and the National Coalition Against Domestic Violence in the enactment and implementation of the Violence Against Women Acts of 1994, 2000 and 2005.

For five years OCADVSA has collaborated with the Oklahoma Attorney General, the Oklahoma District Attorneys Council, the Oklahoma Regional Policing Institute and the Spirits of Hope Native American Coalition to host the Annual Violence Against Women Conference and the annual regional trainings in 4 sites across the state to address the importance and techniques of evidence based prosecution.

The **Oregon Coalition Against Domestic and Sexual Violence (OCADSV)** is a not-for-profit organization incorporated in the state of Oregon in 1978. Our mission is to support organizations that assist victims of domestic and sexual violence; provide training assistance to staff and organizations engaged in crisis intervention, shelter, and public education of domestic and sexual violence; explore and support innovative approaches to prevention of and responses to domestic and sexual violence; and to change societal conditions that cause domestic and sexual violence to exist. OCADSV is also involved in promoting legislation designed to protect and to empower women survivors of domestic and sexual violence and to develop public policy that ensures an effective statewide system to address and respond to violence against women. Our staff is active on many state and governmental committees and councils confronting the issue of domestic violence and sexual assault including the Governor's Council on Domestic Violence, STOP Violence Against Women Advisory Board, Oregon Department of Human Services: Children, Adults and Families, and the State Family Law Advisory Committee—domestic violence subcommittee.

The **Pennsylvania Coalition Against Domestic Violence, Inc. (PCADV)** is a not-for-profit organization incorporated in the Commonwealth of Pennsylvania for the purpose of proving services and advocacy on behalf of victims of domestic violence and their minor children. PCADV is a membership organization of 62 shelters, hotlines, counseling programs, safe home networks, legal advocacy projects, and transitional housing projects for battered women and their dependent children in the Commonwealth. For thirty years, PCADV has provided training and technical assistance to domestic violence programs, attorneys, the courts, and law enforcement agencies on issues of domestic violence.

PCADV is deeply concerned about the safety of victims of domestic violence and knows that battering is extremely dangerous and can be lethal. At the same time, it can also be lethal for a victim to testify against the perpetrator of the violence. The evolution and success of the victimless prosecution model has protected many victims, who cannot or will not testify, from the inherent dangers of participating in the criminal prosecution of the offender. It provides a highly effective means of prosecution that holds the offender accountable and protects the victim from further danger, coercion and trauma.

PCADV joins in the brief of amicus curiae to assist the Court in its consideration of the scope of the *Crawford* decision and the ability of prosecutors to introduce victims' statements at trial by finding they are non-testimonial, admissible evidence.

The **Rhode Island Coalition Against Domestic Violence ("Coalition")** is a not-for-profit organization incorporated in the State of Rhode Island in 1979 to assist and support Rhode Island's six shelter programs for victims of domestic abuse. The Coalition has taken the lead in policy and program development on behalf of battered women for

the past twenty-one years. The Coalition has been active in implementing the provisions of the Violence Against Women Act in Rhode Island, and in national advocacy activities relating to the Act. The Coalition serves as a resource for the six member agencies, providing training, technical assistance, statewide planning and needs assessment research, and dissemination of resources. As an organization dedicated to safety and justice for domestic violence victims, we know that evidence-based prosecution is critical to an effective criminal justice response to domestic violence.

The **South Carolina Coalition Against Domestic Violence and Sexual Assault (SCCADVASA)** is a not-for-profit organization incorporated in the state of South Carolina in 1981. The mission of SCCADVASA is to lead the state in its efforts to prevent and eradicate interpersonal violence. SCCADVASA represents the 23 non-profit organizations throughout South Carolina offering a myriad of services to victims of domestic and sexual violence in both federal and state legislative efforts. In addition, for the last 25 years, SCCADVASA has been instrumental in setting standards of service for all its member organizations and has established collaborative efforts with state agencies, other non-profit organizations and business and industry leaders to educate and inform the general public in regard to the issues of domestic violence and sexual assault and to engage the entire state in efforts to prevent and respond to these crimes. Along with these partners, SCCADVASA continues to formulate new approaches and innovative legal solutions to ending domestic and sexual violence and to ensuring a high quality of services to victims of both domestic and sexual violence.

**Stop Family Violence (SFV),** a national grassroots activist organization founded in 2000, is a project of the Tides Center, a not-for-profit organization incorporated in 1995 in San Francisco, CA. Stop Family Violence's mission is to organize and amplify our nation's collective voice to end

family violence. Our 30,000 members are victims/survivors of domestic violence, sexual assault, stalking, child abuse, child sexual abuse, and elder abuse as well as service providers, allied professionals and concerned members of the general public. Stop Famjly Violence invites its members to take action at the local, state and national level to effect policy change that will ensure safety, justice, accountability and healing for victims of all forms of family violence.

The **Tennessee Coalition Against Domestic and Sexual Violence (TCADSV)** is a non-profit organization composed of diverse community leaders and program members who share a common vision of ending violence against women and children through public policy advocacy, education, and activities which increase the capacity of programs and communities to address violence. Our services include: technical assistance, training, curriculum and resource development, public policy advocacy, newsletter publication, networking opportunities, resource library, speaker's bureau and a toll-free information line. As a statewide coalition, we serve domestic violence and sexual assault programs, community groups and organizations, criminal justice agencies, victim service agencies, allied professionals and individuals seeking information and resources.

The **Utah Domestic Violence Council (UDVC)** is a not-for-profit organization incorporated in Utah in 1998. The mission of UDVC is to lead a collaborative, statewide effort to eliminate domestic violence. UDVC consists of 36 voting members from across the state who represent licensed domestic violence shelters, victim advocate programs, law enforcement, Utah Office of the Attorney General, Utah Division of Child and Family Services, Utah Prosecution Council, Utah Legal Services, Utah Legal Aid Society, Utah Department of Corrections, courts, licensed treatment providers and survivors of domestic violence. Committees

including Public Awareness, Training, Justice and Interfaith Leaders invite community members to participate in the success of our mission, to incorporate best practices in Utah's response to domestic violence and educate the public about domestic violence and the needs of victims. Through training, education and development of public policy, UDVC works to bring together a coordinated response. A statewide, toll free domestic violence information and referral line provides direct response to victims, services providers, family, and others. In addition, UDVC works with 21 local domestic violence coalitions throughout the state recognizing that through prompt availability and accessibility of domestic violence services delivered in a manner that preserves human dignity, and overcomes cultural, linguistic and economic barriers Utah will reduce domestic violence.

The **Vermont Network Against Domestic and Sexual Violence (the "Vermont Network")** is a non-profit organization representing 16 domestic and sexual violence programs in the state of Vermont. Each of our domestic violence programs is considered experts in their community on the physical, emotional and economic dangers women and their families face when attempting separation from their batterers. The Vermont Network as a whole is comprised of decades of experience and expertise regarding how the court system responds to women and children who are battered.

As a coalition, we work closely with our Programs offering support and information so that they can better serve victims of domestic and/or sexual violence. We know that the theory/process of victimless prosecution has created a safer way for victim/survivors to be involved in the criminal justice system. We have a history of working closely with law enforcement, both at the state and local level, and have found them extremely supportive of this technique which allows more success in holding batterers accountable for their actions. Should victims of domestic abuse be forced to testify

against their intimate partner/abuser, the level of accountability for batterers will decrease markedly reinforcing a message of acceptance and tolerance for violence in our society.

The **Virginia Sexual and Domestic Violence Action Alliance (VSDVAA)**, the non-profit state domestic and sexual violence coalition in Virginia, was incorporated in the Commonwealth of Virginia in 2004 after the merger of Virginians Aligned Against Sexual Assault (VAASA, incorporated 1980) and Virginians Against Domestic Violence (VADV, incorporated 1981). VSDVAA is a coalition of individuals, agencies and organizations committed to the elimination of sexual and domestic violence. VSDVAA is a diverse group of individuals and organizations that believe that ALL people have the right to a life free of violence. VSDVAA recognizes that sexual and domestic violence are linked to other forms of oppression, which disproportionately affect women, children and other marginalized people, harming individuals, families and societies as a whole. VSDVAA will use its diverse and collective voice to create a Virginia free from sexual and domestic violence—inspiring others to join and support values of equality, respect and shared power.

VSDVAA supports the use of civil and criminal remedies to 'hold domestic violence perpetrators accountable, and to protect victims of domestic violence. One such remedy is the use of evidence-based prosecution that protects the victim by not asking her to testify against her batterer.

**Professor D. Kelly Weisberg**, Hastings College of Law, University of California, San Francisco, is a nationally recognized scholar in the areas of Family Law, and Children and the Law. She has participated in federally-funded studies of family violence. Her current scholarship highlights civil and criminal responses to domestic violence, the reform of state laws addressing these issues, and the negative impact of

the *Crawford* ruling on the prosecution of domestic violence cases.

The **West Virginia Coalition Against Domestic Violence (WVCADV)** is a membership, statewide non-profit organization committed to ending personal and institutional violence in the lives of women, children and men. WVCADV member programs provide safe space and direct services for victims of domestic violence; the Coalition Statewide Office coordinates a strong network of shared resources that support policy analysis and social change work. These efforts provide statewide systems and local communities viable options needed in responding meaningfully to the needs of victims of domestic violence. In 1988, WVCADV established a Coalition Statewide Office (CSO) to work in the areas of public policy, legislative advocacy, resource development, public information, the development of statewide training programs, and collection and storage of domestic violence data. WVCADV is composed of fourteen licensed domestic violence programs that provide direct services to victims of domestic violence and a coalition statewide office that coordinates public education, training opportunities, and technical assistance to the domestic violence programs, allied organizations, and the general public. WVCADV's Board of Directors is comprised of representatives of each of the licensed programs. The licensed domestic violence programs provide services to all fifty-five counties in West Virginia.

WVCADV works closely with the courts in maximizing victim safety and holding perpetrators accountable for criminal behavior. For many victims testifying in court is too traumatic or dangerous to even consider. The victim may fear, and stalkers and abusers may have threatened, further harm to the victim or other family members if the victim testifies. Rape victims may find the thought of reliving the rape by testifying too much to bear. Young children who

have been sexually or physically abused may be too terrified to sit still in a courtroom to confront their abuser.

Since the mid 1990's, prosecutors have used evidence-based, victimless prosecutions to combat this problem, using such things as 911 calls, police and medical reports, DNA evidence and in the case of child sexual assault victims using videotaped interviews or live video from a remote location to allow prosecution to proceed without endangering or retraumatizing the victims. These victimless, evidence-based prosecutions have been highly successful, in allowing prosecutors to hold offenders accountable while keeping victims safe.

The *Crawford* decision has had a terribly detrimental effect on the prosecution of domestic violence, sexual assault, stalking and child sexual abuse cases. In some cases, prosecutors are not bringing cases to court if the victim won't testify, even if there is strong evidence that a crime was committed. In other instances, prosecutors are threatening victims with contempt of court, or even putting victims in jail to coerce their testimony.

The Sixth Amendment of the U.S. Constitution ensures the defendant's right to confront their accuser, and no one is looking to see this right denied. However, in a murder case, the victim is clearly not available to testify, yet the case proceeds based on evidence. We hope the Court finds the right balance between victims' need for safety and the rights of the accused.

The **Wisconsin Coalition Against Domestic Violence (WCADV)** incorporated in Wisconsin in 1978 (www.wcadv.org). WCADV is a statewide membership organization of battered women, formerly battered women, domestic abuse programs and all committed to ending

domestic violence. Through partnerships and strategic collaborations and education, advocacy and social action, WCDV works to prevent and eliminate domestic violence. We transform societal attitudes, practices and policies both about violence, and about women from diverse communities and their children.

A network of state domestic violence programs, WCADV serves as the voice of battered women and their children and those who provide direct services to them. WCADV has a long history of working at the state, local and national level to promote a strong criminal justice response to domestic violence. WCADV works within Wisconsin on a statewide and local level to implement the best practices in the prosecution of domestic violence cases. WCADV staff and member organizations provide training for law enforcement officers and prosecutors about domestic violence and the needs of victims. WCADV staff participate on the Wisconsin VAWA Justice Systems Training (JST) Initiative. WCADV has been involved in the reform of state laws addressing domestic violence for more than two decades, including revisions to Wisconsin's mandatory arrest law within the past year. WCADV supported and promoted the Congressional enactment of the Violence Against Women Acts of 1994, 2000 and 2005.

**Women Empowered Against Violence, Inc. (WEAVE)** works closely with adult and teen survivors of relationship violence and abuse, providing an innovative range of legal, counseling, economic and educational services that lead survivors to utilize their inner and community resources, achieve safety for themselves and their children, and live empowered lives. WEAVE staff attorneys carry a caseload of the most difficult, long-term legal matters that come into our offices, devoting more than 55 hours to each case. WEAVE strives to maximize our resources to make the legal system as accessible and understandable for domestic

violence survivors as possible by providing legal consultations to survivors proceeding *pro se*, referring cases to our network of *pro bono* attorneys, and offering free legal information clinics. WEAVE also collaborates with other organizations to operate the D.C. Domestic Violence Intake Centers, public/private partnerships that provide vital front-line assistance to battered women, offering information and guidance in seeking civil or criminal legal assistance. Whether because of her history of abuse, or because she may face dangerous and even life-threatening repercussions, a domestic violence victim can be understandably reluctant to cooperate with prosecutors. Because of this inability or unwillingness to testify in court, evidence-based or "victim-less" prosecutions are crucial tools for the state to protect victims and bring their abusers to justice. WEAVE believes that the complex reality of domestic violence must be taken into account in interpreting the admissibility of evidence under the Sixth Amendment.

The **Women's Advocacy Project, Inc. ("the Project")** is a statewide legal non-profit organization organized under Texas law in 1982, and based in Austin, Texas (www.women-law.org). The Project promotes access to justice for Texas women and children in need. Started in 1982 as a legal hotline, the agency has evolved as an expert on legal issues affecting survivors of domestic violence and sexual assault, and now provides a range of services that promote the use of legal protections to end violence against women.

The **Wyoming Coalition Against Domestic Violence and Sexual Assault (WCADVSA)** is a not-for-profit organization incorporated in the State of Wyoming. The WCADVSA is committed to social change, education and systems advocacy for a non-violent society, respect for individuals having control of their own lives and the rights of victims and their children. The Coalition is a network of 24

statewide DV/SA programs. These 24 programs provide direct services to victims and their families and the WCADVSA is their voice at the state and federal level. The WCADVSA has a long history of working to promote a strong criminal justice response to domestic violence. The WCADVSA works with local law enforcement and prosecutors to implement best practices in the prosecution of domestic violence cases. Our Coalition provides training for law enforcement members at the State Law Enforcement Academy and some of those officers, in turn, take national domestic violence training to share with other law enforcement personnel, member programs and prosecutors. WCADVSA has been involved in the reform of our state laws addressing domestic violence and its effective prosecution for two decades. The Coalition is the foremost leader in the state in formulating new approaches and solutions to ending domestic violence.

# APPENDIX B

## LETTERS CONCERNING THE IMPACT OF *CRAWFORD V. WASHINGTON* ON DOMESTIC VIOLENCE CASES

The following statements represent the experiences of prosecutors, law enforcement, victim advocates and victims. These statements have been reproduced. Original versions are on file with Counsel of Record.

## I. LETTERS FROM PROSECUTORS AND LAW ENFORCEMENT

### LETTER 1 FROM: PAUL DEDINSKY, ASSISTANT DISTRICT ATTORNEY & DV UNIT DIRECTOR, MILWAUKEE COUNTY DISTRICT ATTORNEY'S OFFICE, WISCONSIN

I am a domestic violence prosecutor from Milwaukee, Wisconsin, and I am encouraging the Court to rule that excited utterances are "non-testimonial" as a matter of law. Statements unencumbered by forethought are critical to prosecuting domestic abusers. In my experience, current interpretations of *Crawford v. Washington* invite criminal defendants to engage in manipulative behavior to keep their victims from testifying in court.

In a case example from Milwaukee County, Wisconsin, (State v. Lesent Lewis, case # 2004CM8881), the defendant was charged in a criminal complaint with one count of misdemeanor domestic violence battery against his wife, the named victim, on November 14, 2004. According to the victim, she was afraid for her safety because the defendant had warned her in the past that: "if she ever called 911 on him, he would come back and kill her."

When the victim did not appear for trial on 1-26-2005, prosecutors sought to admit her excited utterance hearsay statement that she provided to a police officer. The defense

objected, arguing that admission of the statement would violate his right to confrontation.

Following a hearing, the trial court ruled that a portion of the victim's statement would be admissible as an excited utterance. The case was adjourned for further proceedings. In the interim, the defense sought review by means of interlocutory appeal to the Wisconsin Court of Appeals. In challenging the trial court's decision, the defendant relied heavily on *Crawford*.

Acting upon intuition, a prosecutor contacted the police agency where the victim resided. On March 9, 2005, the police drove to the victim's home in order to check on her welfare and safety. No one was home. According to police reports, a neighbor explained that the defendant was seen that morning at the residence and regularly comes to the residence.

Police returned later that evening to the residence. After knocking at the door, lights in the residence were extinguished. For some time, no one answered the door. A small child then peered through a kitchen window at one police officer. Finally, the wife of the defendant answered the door. She allowed police to enter the residence. Police asked if she had seen the defendant, whose bail conditions included a provision that he have "no contact" with her. According to police reports, the 4-year old child then exclaimed: "My daddy's sitting in there . . . in the living room." The defendant was located sitting on a chair in the darkened front living room. For disobeying the trial court's bail order of "no contact" with the victim, the defendant was charged with bail jumping in a new criminal complaint.

Despite the defendant's arrest for bail jumping and the filing of new charges, defense attorneys still filed their appellate brief on March 10, 2005, arguing that the defendant had been

denied the opportunity to confront his accuser. Eventually, the defense dropped the interlocutory appeal.

While claiming the prosecution and the judiciary were preventing him from confronting his accuser in court, the defendant apparently saw little restriction on his ability to confront his accuser outside of a courtroom. The defendant's actions in disobeying the court's orders and then trying to fool the court – while wielding the *Crawford* decision as his sword—struck me as particularly manipulative.

The above dynamic of "power and control" is a prototypical example of a domestic abuse case. The defendant first warns his wife of the potential dire consequences of reporting his abuse to a 911 operator. Then a violent episode occurs. Then the defendant disobeys the court order to have contact with a prohibited witness. The witness fails to appear in court. Implicit within domestic abuse cases is the threat of future harm, and that is precisely why domestic abuse is referred to as a "cycle of violence."

The ongoing power that batterers have over their victims is apparent from our statistics. Each year, in Milwaukee, prosecutors review 10,000 misdemeanor and felony domestic violence charges. In 2005, forty percent (40%) of domestic violence cases were dismissed. **Ninety-six percent (96%) of those dismissals occurred because victims did not appear in court for trial.**

Although the vast majority of defendants facing domestic abuse charges in Milwaukee are released on their personal recognizance, some more serious offenders are held on cash bail in the Milwaukee County Jail. Several years ago, domestic violence unit prosecutors began to obtain actual copies of phone calls made by defendants held in the Milwaukee County Jail to their victims. This has given us the

opportunity to hear defendants threatening and manipulating their victims and the witnesses against them.

Enclosed with this statement is a DVD of a news story from the local FOX news affiliate in Milwaukee. The news story tracks four domestic violence cases. Based upon the conduct of these four offenders, different types of witness tampering charges were prosecuted. The statements of these offenders serve dually *forfeiture of wrongdoing* evidence. Unfortunately, most of the time, domestic violence defendants are not held in the jail pre-trial, and prosecutors never receive evidence of the intimidation.

The taped telephone conversations from jailed defendants are illustrative of evidence courts rarely get to hear. Violations of bail conditions are rampant. In domestic violence cases, abuse is typically not encapsulated in a singular incident or charge of criminal conduct. Domestic abuse occurs in the context of a relationship, one that can breed intimidation and manipulation from those seeking to exert power and control over those more vulnerable victims.

Before writing this letter, I reviewed the National Association of Criminal Defense Lawyers' amicus briefs, which describe to you the phenomenon of "evidence-based" or "victimless" prosecution cases. However, never do those amicus briefs explain to you why prosecutors must proceed forward with their cases in the absence of victims; many defendants are responsible for threatening or otherwise dissuading their victims from appearing in court. These defendants ensure that their accusers' statements will never be tested in the crucibles of direct or cross-examination.

It is my opinion that *Crawford* is being used as a tool to suppress excited utterances and similar firmly rooted hearsay exceptions. Once a victim is intimidated from appearing in court, the defendant is nearly always rewarded with the dismissal of his charges. This is untenable. This is a

miscarriage of justice that can only be righted by the Court's decision holding excited utterances to be non-testimonial as a matter of law. In the end, the Court needs to adopt a position that will promote victims to testify in court free from intimidation and harassment

**LETTER 2 FROM: HARLAN H. F. WOOD, ASSISTANT DISTRICT ATTORNEY, CHEROKEE COUNTY JUSTICE CENTER, CANTON, GEORGIA**

As an Assistant District Attorney in Canton, Georgia, I have witnessed directly the impact of the *Crawford* decision on one of my cases. The background that I am forwarding comes from the case: *State of Georgia v. Steven Tyler Miller.* This case was indicted and tried prior to the *Crawford* decision. *Crawford* issued, and my case was appealed based mostly on the *Crawford* decision.

The victim in my case did not testify. While I cannot say with certainty the reasons for her decision not to testify, I suspect it had something to do with her fear of the Defendant and with the fact that she moved to another state to live with family and escape her abuser. As a result, I relied on the Res Gestae exception to the hearsay rule at trial. The Victim's statements were allowed to be presented through the responding officer. Defendant was ultimately convicted of Count 1: Aggravated Assault (O.C.G.A. § 16-5-21), Count 2: Terroristic Threats (O.C.G.A. § 16-11-37), Count 3: Battery under the Family Violence Act (O.C.G.A. § 16-5-23.1), and Count 4: Obstruction of 911 Emergency Telephone Call (O.C.G.A. § 16-10-24.3).

The *Crawford* decision issued following a jury verdict resulting in a conviction in my case. The Court of Appeals of Georgia considered, among other things, whether the officer's statements as told him by the victim were admissible in view of *Crawford*. They determined that those statements were in fact **inadmissible**. That left them with a decision to make

about how those inadmissible statements, that were considered by the jury, affected the case. After considering everything, they concluded that without considering the inadmissible evidence, there was insufficient evidence to convict Defendant of Count 2: Terroristic Threats and Count 4: Obstruction of a 911 emergency telephone call. As such, they reversed the convictions on those two counts.

It turns out however that the Defendant testified at his trial. In doing so, the things that he stated, ultimately, according to the court of appeals, were sufficient to affirm the conviction on Counts 1, and 3. Count 1, Aggravated Assault is a felony in the State of Georgia which carries a 1-20 year sentence. Defendant was sentenced to 20 years with the first 4 to be served in custody. As of today, it is my understanding that he remains in custody.

The impact of *Crawford* on my case is that two counts for which the Defendant in the case I presented were reversed. It did not impact the sentence though in my case since the driving charge in sentencing was Count 1, Aggravated Assault. Please keep in mind though that two counts for which Defendant was convicted by a jury, were reversed. Had Defendant not testified, it is my belief that the entire case would have been reversed. Victim has two children with Defendant. She, at the time, had been together with Defendant for nearly 18 years, and had endured a life of abuse, that ultimately resulted in self-medication with alcohol. When I told her that I was not going to dismiss the case—the opposite of which she undoubtedly was used to hearing upon her request—she made herself scarce. As things stand today, the same situation would most likely result in acquittal. Post *Crawford* domestic violence defendants have absolutely no reason to testify. That certainly would have been the post *Crawford* advice Defendant Miller would have received from counsel. While the ultimate impact of *Crawford* on *State of Georgia v. Steven Tyler*

*Miller* is negligible from a sentencing view, the message sent is crystal clear—that is, if domestic violence victims do not testify, no conviction follows.

### LETTER 3 FROM: BRANDELYN NICHOLS, VAWA PROSECUTOR/ ASSISTANT CITY ATTORNEY, KANSAS CITY, KANSAS

As a VAWA Prosecutor/ Assistant City Attorney in Kansas City, Kansas, I have had daily contact with the effect of the *Crawford v. Washington* ruling. Prosecution of domestic violence crimes rely almost solely on out-of-court statements.

I have had success in municipal court arguing that a domestic violence victim does not understand or expect that her 911 calls or excited utterances will be used as testimony in a trial against the defendant. However, if the case is appealed to the district court, my success in the prosecution of these cases is quite limited. The district court judges are hesitant to apply the hearsay exceptions prior to *Crawford* and without definitive case law, refuse to allow out of court statements in domestic violence cases after the ruling in *Crawford v. Washington*.

I do not frequently use warrants or impeachment of victims to ensure convictions. In my experience, it may lead to a successful record, but it actually harms the victims in future prosecutions. For example, if the victim of domestic violence has children who will the children, stay with while she is in jail awaiting trial, in the home with the abuser? What affect does that have on a divorce or custody case either pending or in the future?

It is imperative to have some guidance on what constitutes testimonial statements versus non-testimonial statements. I would argue a victim of a domestic violence crime, unless she is also a criminal law attorney, has no expectation that a 911

call or excited utterance to a police officer would be used as testimony against her abuser. A 911 call or excited utterance is in effect the same as a cry from the street corner for help and therefore should not be held as testimonial.

### LETTER 4 FROM: PROSECUTOR, TWIN CITIES METROPOLITAN AREA, MINNESOTA

I am a prosecutor in the Twin Cities metropolitan area in Minnesota. I handled a case once involving a woman who had been "with" the father of her children for about 8 or 9 years by the time she was 24: She had known him at the age of 14, and he had a conviction at that time for depicting a minor in a sexual performance (filming a sex act with her). She had two children with him by the time she was 20 years old.

This man was in a gang and was extremely physically and mentally abusive. It was clear by the time I encountered these people that he had dominated and controlled her life since the moment she became involved with him.

The case I charged out occurred about 2 months after she had broken off the relationship—often the most dangerous time for an abused woman. He still had a key to her apartment, and had had some gang buddies watching her apartment. She had a male friend over for a visit, and suddenly three or four men (including the abuser) burst into her apartment using the key. The male friend fled, and the other men stood by as the abuser took her to a back bedroom and beat and kicked her repeatedly. He gave her multiple bruises and knocked out a front tooth, which is first degree assault in Minnesota.

The men left, and she drove herself to the emergency room. She initially protested against calling the police, but eventually (perhaps without her knowledge), the police arrived and took her statement, in which she said that the "father of her

children" had caused her injuries. She also told the medical people this description of the assailant. She didn't say his name.

As time went by, she went back to her work and life, and the abuser (contrary to court order) contacted her and her children. Meanwhile, I had charged him with several severe counts involving lengthy prison sentences, especially given his lengthy criminal history. The woman had chosen not to use advocacy services.

Not surprisingly, the defense attorney got a call from her on the eve of trial asking how she could "change her story." He ethically reported this to me, and I met with her. She said the same thing to me: how could she "change her story?" I told her I couldn't take a statement from her—only the police could do that.

So, I was stuck knowing that the likelihood that she would truthfully identify the assailant from the witness stand was unlikely, and that I really didn't have her giving his name at any point. Clearly, this woman was isolated and alone, and was rightfully very afraid of not only this abuser, but also of his gang buddies who would be free, even if the defendant went to prison.

Crawford prevented the use of her out of court statements. I had no witness to actually name the assailant (the man who was visiting her claimed not to see who entered the apartment). The end result was that I had to drastically reduce the prison term available, and also to agree to probation of all things for this repeatedly violent offender. I do not know whether he is still on probation, but even if he serves a prison term, it will be nowhere as long as the one he deserves or the term which would keep his victim and children safe.

Thus, my inability to use her statements meant that I could not level a just punishment against this gangster for his repeated abuse of the mother of his children.

### LETTER 5 FROM: PROSECUTOR, LEE'S SUMMIT, MISSOURI

I am the domestic violence prosecutor in Lee's Summit, Missouri, a suburb of Kansas City. The *Crawford* opinion has had a devastating effect on my ability to prosecute these cases. As the decision filtered through the defense attorney community, attorneys began telling their clients that if the victim did not show up the case would be dropped. The abusers then put pressure on the victims; the appearance rate of victims plummeted, as did the conviction rate in domestic violence cases.

This case has set the prosecution of domestic violence cases back twenty years. I was here in the bad old days when a man would be holding the arm of his wife as she was telling the judge that she did not want to prosecute the case. Do we really want to return to that era? In any other case, such interference would be construed as witness tampering. In these cases it's considered a "relationship dynamic." If an abuse situation is so bad that the police are called in, it is no longer a "domestic" matter. It is a crime, and should be treated as such. 911 tapes, police reports, and excited utterances are used in the prosecution of other crimes—why not domestic violence?

### LETTER 6 FROM: POLICE OFFICER JEREMY ROMO, ST. LOUIS COUNTY POLICE DEPARTMENT, MISSOURI

As a police officer for the last six years I have witnessed domestic violence and the devastating effects that it has on the victims, as well as, their children. Victims are forced to live in fear. They are subject to verbal and emotional abuse that makes them feel like they are no longer human. I have witnessed women brutally beaten. Unfortunately, I have also

witnessed victims lose their lives at the hands of their abuser. I patrolled the some small area for three years and over those three years I came into contact with some domestic violence victims on several occasions. I would get to know their names and the names of their children. Some of those repeat victims were unable to leave their abusive relationships for very legitimate reasons. Some had become isolated from their family and friends and had nowhere to go. Others had not been allowed to get any education or formal job training and could not support themselves and their children it they left. Some of the victims who stayed did so because their partners had told them over and over about how if they tried to leave he would hunt them down and kill them and their children because, "if I can't have you nobody will." Many nights I raced to the homes of these victims that I had grown to know and worry about for yet another domestic violence call. As I drove I hoped that this wouldn't be the night where that victim lost their life. Unfortunately, domestic violence victims often pay the ultimate price with their lives. There were several cases in the St. Louis area in 2005 where a victim left an abusive relationship and the abuser found the victim and killed her and in some cases her children.

Domestic violence perpetrators are masters of control and manipulation. They can be extremely emotionally and physically abusive one minute, but they can turn their abusive behavior off at the drop of a hat. When the police arrive the victim is often yelling, crying, and acting erratic, which is not unreasonable because of what they have been experiencing. They are looking for help, but they probably know from past experience that they may not get the help that they deserve. This absence of help could have been due to poor police response or the abusers ability to turn off his abusive behavior and convince the police that everything is fine or that the victim is the problem. Hundreds of times I have responded to a domestic violence call to find a victim who is hysterical and her partner is completely calm. It is not uncommon for the

abuser to point to the victim and state, "Look at her she is crazy". Usually if a police officer investigates further by talking to witnesses or examining the available evidence they will find that a crime did occur. The victim is understandably upset. She has taken a chance by involving the police and she knows if her abuser can convince the police that everything is fine they will leave and she will be subject to more abuse for trying to involve the law.

When I make the argument to others that abusers are controlling and manipulative, critics will ask me how I can possibly know what goes on before I arrive at a domestic violence scene? How can I support my claims that it is common for abusive men to lie to the police and abuse their partners to the point that they cannot leave the relationship without fear of further abuse or even death? What proof do I have?

On top of seeing domestic violence as a police officer I am also an instructor in a batterer intervention program. Two or three times a week another instructor and I sit in a room with several men that are mandated by the conditions of their probation or parole to complete the class. As instructors, we try to convince the men to make the choice to hold themselves accountable for their abusive behavior. We try to educate the men about violence and abuse and show them how they have used it to control their partners. For almost three years I have listened to batterers talk about their abusive behavior. We stress that we are not only interested in the behavior that convicted them, but also their post abusive behavior. As the men learn about domestic violence and begin to hold themselves accountable, a picture begins to emerge. The picture that emerges is one of a pattern of physical and emotional abuse that has been devastating to the life of the victims. Specifically, many abusers admit to

manipulating the police and court system to avoid accountability. They admit threatening their partners with taking the children, physical abuse, or even death if they testify against them and in the past their abuser has made good on his threats.

A majority of the men in the batterer programs were convicted using victimless prosecution. Victimless prosecution takes a huge burden from the victim and increases her safety. From my experience spontaneous utterances made in the heat of the moment when the incident is fresh in victims mind are honest and accurate. Spontaneous utterances are made before the victim has the opportunity to think of the consequences of speaking truthfully about how she was victimized.

It takes weeks and sometimes months for the men in the batterer program to begin to hold themselves accountable and admit their abusive behavior. Some men never hold themselves accountable. But, many of the men who complete the program tell us how they are glad they attended. These are the same men that stated they did not need to be in the program when they first started. They are also the men who, by their own admission, committed terrible acts of violence and abuse towards their partners. They feel that without the batterer program they would have continued to be abusive. Several of the men have stated that they are glad they were convicted and sent to the batterer program. Yet, these are the same men that would have never been convicted without victimless prosecution. Domestic Violence is an epidemic in our society, but the men and women who have committed themselves to help the victims are making a difference. Victimless prosecution in cases of domestic violence is an invaluable tool. It not only protects domestic violence victims, but it often leads the perpetrators to make positive changes in their lives through education and counseling.

## II. LETTERS FROM VICTIM ADVOCATES

### LETTER 7 FROM: KERRY HYATT BLOMQUIST, LEGAL COUNSEL, INDIANA COALITION AGAINST DOMESTIC VIOLENCE

In Marion County, Indianapolis, Indiana, and communities nationwide, the *Crawford* case has had a significant and startling effect on the prosecution of domestic violence criminal cases. Our most recent statistics from Marion County, Indianapolis, Indiana indicates that slightly over 24% of felony domestic violence cases and 27% of misdemeanor domestic violence cases are dismissed, primarily, according to prosecutors, because the victim either recants his or her testimony or fails to show up at trial.

Our obvious concern if *Hammon* is reversed is that not only will that dismissal percentage increase substantially literally overnight, but clearly many, many cases in the future will not even be appropriately investigated or filed if it appears the victim is reluctant to testify against the abuser. This effectively leaves the decision to prosecute within the control of the abuser, if the abuser knows that charges would be dropped if the victim was too intimidated or scared to testify

The outcome of this case is huge. Please do not disarm the system that holds batterers accountable. The decision to prosecute must be left in the hands of effective law enforcement and prosecutors, not left to the will of the batterer.

### LETTER 8 FROM: TARA L. MUIR, LEGAL DIRECTOR, NEBRASKA DOMESTIC VIOLENCE SEXUAL ASSAULT COALITION

In Nebraska, the *Crawford* decision had a significant effect on the prosecution of domestic violence criminal cases.

Some county prosecutors were just beginning to try cases without the victim's testimony, mainly using the police report and the 911 call, with some success. Other prosecutors who have been slow to understand the dynamics of domestic violence were reluctant to go forward without a victim's testimony before the *Crawford* decision. These prosecutors used the decision as one more reason to not prosecute a case at all without the victim testifying, regardless of other witnesses or admission of the defendant.

Many reasons exist why a victim is reluctant or unwilling to testify. In one county, a prosecutor reported a case where the defendant had a friend come to his house the day of court and "baby-sit" the victim to make sure she didn't come to court for the trial. In a previous case, this same batterer threatened the victim not to show up but the prosecutor was able to get a conviction without her, using other witnesses to the offense. The batterer eventually elevated to felony charges, and the victim was able to come to court for the felony trial and the minute he saw her, he plead guilty and was sent to the pen for several years.

### LETTER 9 FROM: MARY HAVILAND, ESQUIRE, CO-EXECUTIVE DIRECTOR, CONNECT, INC., NEW YORK, NEW YORK

I am a co-executive director of CONNECT, Inc., located in New York City, New York. CONNECT is dedicated to the prevention and elimination of family and gender violence and to the creation of safe families and peaceful communities. CONNECT transforms the attitudes, beliefs, and behaviors that perpetuate family and gender violence and addresses these complex issues through prevention, early intervention services, and community empowerment. The following are examples of cases from our Legal Advocacy Helpline or our program with the 25th Precinct in East Harlem.

Case 1

I have been working with this client since 5/7/05. This client is a survivor of domestic violence who is working full-time and attends a college program. Her partner was arrested on 3/20/05 for Harassment. Our client has two kids, one of whom is the son of the defendant. This client suffered beatings, harassment and threats from her abuser. She has also suffered the pain of hearing, listening and seeing her kids including the one child she has in common with the respondent being harassed and abused by the defendant.

The defendant called the client's job while an order of protection was in effect and threatened that if she did not drop the charges, he would continue to harass her and her kids. The defendant once called the client's job to tell her that "[he] has tried to kill her before, but that the next time ~~he will not~~ fail to do so." The respondent went to the oldest son school to harass him about where they lived because he wanted to know where my client was now living. The client's oldest son gave the defendant a false address in order for him not to continue to harass him.

I, as Legal Advocate, called the A.D.A. and inform her of what was going on. The A.D.A. obtained an order of protection for the respondent to stay away from our client's children. The A.D.A. informed me that this case was set to go to trial and the client would have to testify. When I tried to discuss this with the client, she was initially reluctant to accept my help because of the fear she felt of testifying against the respondent. The client felt that she was being betrayed by the system, and that no one was really concerned about her safety if she did testify. The client's biggest fears were that testifying against the respondent would be dangerous for her and her kids, fearing that the respondent would eventually try to hurt her and her kids even if that meant after he served time in jail.

The respondent had been arrested in 2003 and was in jail for 18 months, and when he came out he continued his abuse towards the client and her kids. The client did not go back with the respondent after he came out of jail, but that did not change the fact that he still felt he had control over the client, kids, and the client's life. I explained to the client I was here to help her. I told the client that I would do the best I can to make sure she feels safe throughout this process, and discuss her concerns with the A.D.A. I also referred our client to counseling which she has continued to receive throughout the duration of the case. The A.D.A. explained to the client that before she asked her to testify, she would call her to prepare her for court, and would find ways to make her feel safe throughout this process. I also told the client that I would try to find an escort to escort her to family court when testifying against the respondent. This case has not gone to trial yet. The respondent has refused accept plea offers by the District Attorney's Office.

Case 2

A past client of mine, during our initial intake and subsequent conversations, has vehemently conveyed to me the fears she has of facing, let alone testifying, against her boy-friend in his upcoming criminal trial. My client was brutally acquaintance raped twice (not by her boyfriend), the last time in front of her child. At that time, her boyfriend and she were separated.

However after the rape, my client reconciled with her boy-friend who beat her when she refused sex with him. He went further to question why she *could* have sex with the man who raped her and not with him, a man who claimed to *love* her. My client suffered numerous bruises and serious emotional trauma. She has since been hospitalized and undergone surgery.

One of the fears she conveyed to me was that every time she sees her boyfriend, or even a photo, she relives both the rape and battering. To my knowledge, my client has not been diagnosed with Post-Traumatic Stress Disorder (PTSD), but she exhibits common symptoms of PTSD such as flashbacks triggered by anything that brings to mind an aspect of the rape, depersonalization and amnesia. Reliving the trauma, while testifying, would be extremely difficult for my client for these reasons.

### LETTER 10 FROM: COURT ADVOCACY PROGRAM, COLLECTED BY FAMILY RESCUE, INC., CHICAGO, ILLINOIS

Client was referred to our program by a Chicago police detective. The client explained that she previously filed criminal charges against her boyfriend for domestic battery, received an Order of Protection and had a warrant issued for the offender's arrest. The day before the client and offender were supposed to appear in court, the offender waited for the client outside of her home and attacked the client leaving injury. The offender threatened the client by saying if she showed in court tomorrow to proceed with the criminal case he would kill her. As a result, the client did not appear and her case along with the order of Protection was terminated. When asked why the client didn't go to court, the client stated that she was embarrassed about her injuries and believed the offender would really come for her and carry out his threats.

### LETTER 11 FROM: MITHRA MERRYMAN, ESQUIRE, BOSTON COLLEGE LEGAL ASSISTANCE BUREAU, MASSACHUSETTS

Grace [not her real name] is 32 and has three children with her husband. I was connected with Grace through a special project funded by the Department of Justice and run out of Greater Boston Legal Services. The women I work with through the hospitals, as opposed to those I represent in court, are at the early stages of their process of understanding that

what they go through at home is not "normal" and that their husbands are, most likely, not going to change.

Grace's legal problem, as she identified it, was that she did not wish to testify against her husband in an upcoming criminal trial. Grace spent approximately 20 minutes explaining to me her and her husband's interactions regarding a shirt she apparently didn't launder correctly. This led to a *20* second explanation of how he punched her twice in the face because of it. She called the police and they did the right thing: they arrested her husband. Grace then explained that "the law is of no help" to her because of what happened after her husband was arrested and therefore she did not want to cooperate with the prosecution of her husband's case anymore.

This is what happened to Grace after her husband was arrested. First, her sister-in-law, who had been living with them and helping to care for the children while she was at work, was upset at Grace for calling the police and left. Since her husband was the only other person who cared for the children while she worked, she was left with no child care. Second, when she called in sick at work (because her face was swollen and bruised) her employer told her the next sick day would be her last working with him. The next day she confided what happened over the phone to the home-care worker who helps with her eight-year old mentally retarded child. While the worker was sympathetic, she called back later and abruptly cancelled the next three home-care visits. Desperate, she called her own mother for help with the children. Her mother told her that she couldn't help and that she should go back to her husband. Finally, Grace realized that without her husband's income, without child care and without a job she would be unable to pay for rent, food and all the other necessities of herself and her children. She did what any reasonable person would do under the circum-

stances: she begged her husband to come home and apologized for calling the police.

Part of my work with Grace was trying to change her conception that "the law" didn't work, to an understanding that her community and our society is what failed her. Still, her story is emblematic of the reality of many women who are mothers and wives: when they are abused in the home their responsibilities toward their children and the lack of available resources and support for them will often be determinant in whether or not they cooperate with laws that punish their abusers but don't provide the necessities of daily life.

## LETTER 12 FROM: NORTH CAROLINA COALITION AGAINST DOMESTIC VIOLENCE

Evidence-based prosecution is an essential component of effective intervention in domestic violence cases so that perpetrators are held accountable and victims are protected from future violence. Domestic violence homicides are one of the most preventable crimes in that the criminal justice system often has an opportunity to intervene prior to a homicide. If perpetrators are held accountable through successful prosecution of domestic violence crimes, future violence and homicides can be prevented. Evidence-based prosecution provides the tools necessary to achieve this important goal.

When the Court handed down its decision in *Crawford v. Washington*, it set back efforts by North Carolina prosecutors to use evidence-based prosecution to secure convictions in domestic violence cases. Out-of-court statements made by domestic violence victims are often critical components of any evidence-based prosecution, and the *Crawford* decision called into question the admissibility of such statements in a criminal trial. Justice Scalia's opinion in Crawford declared

that "testimonial" statements made out of court would only be admissible if the declarant was made available to the defendant for cross-examination. However, the opinion conspicuously avoided a detailed definition of what "testimonial" meant, and as such, the lower courts have been left in turmoil as they struggle through this new and uncertain jurisprudence of "testimonial" statements.

These out-of-court statements are especially important in the evidence-based prosecution of domestic violence offenses. For a variety of reasons—economic pressure, the perceived moral and legal obligations of marriage, and fear of further physical violence, among others—the victims of domestic violence are often reluctant to appear in court and testify against their abusers. Evidence-based prosecution calls on prosecutors to collect evidence of domestic violence crimes which will allow them to prove these offenses with or without the participation of the victims. Because the out-of-court statements of domestic violence victims often play an important role in evidence-based prosecutions, the Supreme Court's decision in *Crawford* severely impeded these efforts.

It is within this uncertainty that North Carolina's prosecutors now struggle to prove domestic violence cases. The state's appellate courts have handed down a few rulings which attempt to define more precisely the parameters of the *Crawford* decision, but prosecutors and judges anxiously await further clarification from the United States Supreme Court. In the absence of clear rules, individual trial judges are making their own determinations as best they can. But without a workable and mutually agreed upon definition of "testimonial" statements, these well-intentioned efforts can result in a patchwork of inconsistent and conflicting rulings across the state.

## Letter 13 From: Donna Plier, Program Director, Guardian Angel Community Services, Illinois

In our experience, if the Crawford decision is upheld it will eliminate the teeth from the police power of a directed arrest. Even if the officer makes an arrest on the facts he views, without a witness, there can be no prosecution.

For example, in a recent case, a woman came into the Order of Protection office seeking an OP after her husband scalded her with a pot of boiling water. She filed the OP 48 hours later, but then called to say that she wished to withdraw the complaint because of what were probably financial considerations. The OP process was explained as was the fact that we have no control over the criminal process. This woman has repeatedly attempted to convince the state attorney's office to withdraw the charges. The state declines to do so, having made felony charges. The State's Attorney is threatening to subpoena the client to court to testify. The client is threatening to claim police coercion. All believe this abuser was intentional in his efforts. If his wife is compelled to testify against him and refuses to do so, he will be released. Only through hearsay of the police and paramedics, could this case go forward.

## Letter 14 From Southwest Virginia Victim Advocate

Why do victims not want to testify? They are humiliated, embarrassed, intimidated, sleep deprived, paranoid and afraid. They've been told "I'll take the children." "No one will believe you." "You are stupid." They've been isolated from employment, family, friends, and church.

If she testifies, she is often verbally berated by the defense counsel, the abuser and the Judge. Her case is heard without a prosecutor, (Commonwealth's Attorney's are not required to prosecute misdemeanors). She's often told after the case is

dismissed, she doesn't need a protective order due to having a mutual injunction as part of the separation agreement. If she says she fought back or argued during the altercation, she's seen as contributing. If she gets angry while testifying, her attitude, it is hinted, may have contributed to the incident. If it is the first time an assault has made it to court, he's usually given unsupervised probation and possibly sent to the batterer's intervention program. He walks out free and she walks out with no protection to the words: "I'll take the children." "No one believed you." "You are stupid." And again, she's humiliated, and afraid.

### LETTER 15 FROM: ANONYMOUS VICTIM ADVOCATE

I am a victim advocate who is working with a victim of a domestic violence rape. When I responded to the scene of this rape the victim was in nothing more than a towel. The investigation was completed, the victim was taken to the Sexual Assault Treatment Center, and an arrest was made. In this state there is a Pre-Filing Interview with a state attorney. I informed the victim of this procedure and she was very reluctant to attend because she was afraid of retaliation from the offender's family. She eventually agreed and we went to the interview along with the arresting detective. She stated in the interview that she would not testify because of her fears. The state attorney told her that if she did not testify that she could be subpoenaed and if she did not show at the trial she could be arrested. This is not the way we should treat victims. As a victim advocate I have been faced with this problem many times. I have been with my police department for 25 years and would like to understand why as an advocate for victims of violent crime I cannot speak on their behalf when there is such fear of retaliation and intimidation. I have had many other similar cases like the one stated above. I would be happy to do whatever I can so that I can have the voice that the victims fear to have.

## LETTER 16 FROM: ANONYMOUS ADVOCATE

As an advocate for domestic violence and sexual assault victims in a rural community, I find that having the ability of victimless prosecution is essential in saying to perpetrators of this crime that what they did was wrong and will not be tolerated by the community. There are many reasons why a victim will not testify. One of the main reasons is fear from threats made by the abuser. If a perpetrator is able to go free because he has threatened the victim and the court dismisses the case it will just reinforce to him that his tactics work.

## LETTER 17 FROM: ANONYMOUS ADVOCATE

I am our Director of Legal Projects—which means that, in addition to counseling, I do restraining orders for victims. I have seen women, when faced with the ideas of testifying, leave the area or return to their perpetrator rather than testify. Some counties in California issue warrants for victims who refuse to testify. Talk about revictimization!!!

It is important for the system to understand that these victims, and their children, have been threatened with their lives if they testify. Women are killed everyday in domestic violence situations. Please look seriously at the repercussions of forcing victims to face an abuser who has always had all the control and still wields the power.

Additionally, a big concern of victims is that so often the perpetrator is sentenced to credit for time served, stay away (from the woman), and three years summary probation. Why would a person risk their life for this? There are no safeguards. When the stay away order goes into effect it does not include the children, so the perpetrator is free to pick up the children and take off. What better way to get a woman to return? This all happens whether they testify or not. Again, why should they put theirs and their children's lives at risk.

Perpetrators are not prohibited from calling their victims when in jail. Women are then receiving calls demanding they change their story or 'pay the consequences.'

I pray this information helps to make a difference.

### LETTER 18 FROM: ANONYMOUS ADVOCATE

I worked as a social worker for the Massachusetts Dept. of Social Services for nearly 15 years. I dealt with many child victims of sexual abuse and many adult victims of domestic violence during those years. None of them would have been able to testify in court without suffering further emotional trauma, and were too emotionally fragile to have that even be considered. What can anyone with common sense be thinking that this can even be something we need to debate? How can we as a society in good conscience even consider making victims re-experience their traumatic experiences in a courtroom? When will we stop putting the rights of the accused ahead of the victims? As Bob Dylan wrote many years ago, "The answer is blowing in the wind."

## III. LETTERS FROM VICTIMS

### LETTER 19 FROM: ANONYMOUS VICTIM

I have been trying to get divorced from my abuser for almost 3 years. After 9 years of sexual & emotional abuse to me, some violent sexual assaults, I left with my children while he was away on a business trip. I reported the most violent of the assaults to the police, my children's therapist reported their abuse to Child Protection. I could not even bring myself to talk about some of it until after about 10 months of intense therapy. There are still some aspects of my relationship with my spouse that I may never be able to talk about.

I testified in open court. During & after the court hearing, I was accused of being a vindictive, bitter wife, making the story up and that I told my children to say they were abused. When he was confronted with the fact that he had 2GB of rape and bondage porn on his computer and having an affinity for teenagers (all in open court) he admitted to liking to control his partners and to keeping me on an "allowance." He also admitted to a drinking problem and acting out his fantasies with college students. I did not understand truly till after the court hearing about circumstantial/physical evidence. It seemed to me there was enough.

So he was ordered to go to therapy with a sexual predator guru. The court system kept him away, for awhile. However, since he is the biological father of the children, he is allowed to see them, and through this relationship he continues to harass me, intimidate and revictimize me and my children.

Even today, I am court ordered through the Texas family court to go to "joint parenting" sessions with him. The rape that he did to me was bad enough, the rape by the court system is worse. The amount of pain and humiliation in talking about the manipulation, the rape and the abuse and then being reabused in the court system, told it was my fault, was about more than I could bear. I was on massive sleeping pills, suffered with PTSD—given antidepressants and anti-anxiety medication, and lived with my parents for almost a year until I was functional again.

Knowing what I know now, would I do it again? I doubt it. What was the point? Nothing changed. He can manipulate the system and has never been held accountable. But if I take my children to another country, I would be found guilty of child abduction. He has threatened to kill me, but the court system doesn't care. Yes I had a protective order for awhile. . . I guess maybe my kids and I would have justice if he kills

me, but I doubt it . . . he'd charm his way into minimum time and parole . . . he's been in therapy so he's all better, right?

### LETTER 20 FROM: ANONYMOUS VICTIM

My story covers many of your points and a span of almost 20 years. I hope and pray that my story will show the court that a consideration for victims should be a part of the judicial process. My abuse began in 1988. While some incidences may have been seen as borderline, several where obvious abuse—a broken nose, cracked jaw, numerous bruises—usually around the neck. Before the births of the children that we share, born in 1991, and 1992, I withheld testifying because of his threats to me—afterward this included threats regarding the children. I was not stupid or uneducated; I came from an upper middle class home. It all started so gradually that I did not see the cocoon of helplessness and no-contact that he had enveloped me in.

I had gradually been cut off from friends and family so that I truly believed I had no one to help, and as in the case of some abusers, mine had friendships with some of the police. He left me with three young children (the 92 birth is a set of twins) but insisted that I remain faithful to him as he lived and dated several other women. As I could not afford to work and pay daycare, I was reduced to living on welfare—and he used this against me also. He stole what little money I had on many occasions, raped me and beat on several occasions.

When the police would come, he would laugh and state, "you know those welfare women", and they would laugh along with him. Even with prodding from medical staff, I almost always refused to testify—if the police wouldn't believe me who would? After the children, there was his added threat that he would follow through with social services and have the children taken from me, as on some occasions I had fought back with the abuse—I have never understood this one

either—what would the law have you do instead while someone is strangling you, throwing you up or down a flight of stairs, or slamming you in the back with a 2x4 board? Most of the more serious incidences where reduced to obstructing an officer or similar reductions that had nothing much to do with the actual crime he had committed.

Things began to change when I found an at-home study program to finish my degree. I talked with professors at the university and took exams via proctor. I made new friends and old friends and family began to renew their faith in me. My parents helped me locate to a new town, almost 200 miles away. To the avail of friends and family, it only helped somewhat—he continued to try to pursue me with threats again about the children.

The last time he beat me was in November of 1994—and I am shaking even now as I recall it. I told him "no", in no uncertain terms, "no". I would not do this anymore. Our children where at daycare, as in my new location, I had found assistance to work part-time and go to school. The "no" was met with quite a beating. He truly tried to kill me. In an instant of the madness, when I could barely walk—(at this time I had broken ribs and severe swelling and bruising around the throat)—I pretended to vomit—my abuser's weakness was a bad stomach—as he turned to face the other direction. I went for the 2nd story window as quickly as I could. I didn't make it—he caught my arms on the sill—but I screamed and yelled enough to get the attention of neighbors. It still didn't stop completely. He explained to neighbors it was just a spat and pulled me in broken and bruised and bleeding—and pulled all the phones from the plugs and made me sit next to him. He gave me the usual threats and then sat there until he knew that I had to pick up the children from daycare so that I would not go to the police or hospital. He followed me to the daycare after making me clean up as best as possible—and left from the daycare. The old me may have

listened in fear, but the new me was determined to pursue my new life without fear.

As soon as I was certain that he was well on his way home almost 200 miles away I made my way down the hallway. There I told the daycare that I was in a car accident and might they please hold my children for a bit longer so that I could get to the doctor. They only had to look at me to agree to help. After receiving medical attention, once again the police were called, and I was prepared for the usual. This town was different. This officer explained to me that he could help me simply by getting evidence of my injuries and the obvious evidence of a struggle in my home. I may still be asked to testify, he explained, but in a case such as this the evidence might speak for itself. I proceeded to press charges and the officer took pictures of my injuries and my home—for the first time. It was again humiliating and degrading but went to trial and for the first time my abuser was charged and convicted of battery.

I was subpoenaed to testify but never needed to—the evidence did speak for itself. I can't describe the feeling of how it felt, after so long, that someone believed me—and that someone had taken action so that I possibly wouldn't have to suffer anymore. I also can't explain how relieved I was that I would not have to testify. Today, even ten years later, after years of counseling to become whole again—I still have a hard time facing him in court in matters facing the children. Over ten years after my last beating it still makes me throw-up when I have to face him. I break out in a horrible, drenching cold sweat. I shake from the tips of my fingers to toes--of which I usually have to consciously place on the ground with force to stop my heals from clacking in the courtroom. Time can heal the wounds from the past but nothing can stop the fear that I have of this man. I often have to seek medical attention afterwards for migraines. No victim should have to face their antagonist. Fear--not the abuse

itself—is the major part of abuse that keeps a victim in their helpless position. This position should not be a part of the case in the court room. I am still thankful that I did not have to testify on the day that my abuser was convicted of his crime. I can't imagine the fear that I would've felt then. That fear has been used as a proficiently as any knife or gun might be used by a marksman or hunter. While a true weapon such as a knife, or gun may be used as part of the package, the look, the voice, or the words of the abuser serve as just as much a fear stimulator—and those that have been at it for a while are expert fear marksmen. Through the words of my story and others, I hope that the magnitude of that fear is realized—Thank you so much for listening to my story!

### LETTER 21 FROM: ANONYMOUS VICTIM

I didn't realize I was a victim to domestic violence until I was almost killed. I lived with this man for two years and we always had confrontations, never anything physical, about the changes he wanted me to make. He would maké statements that I didn't know how to be a woman, or criticize me on the way I cooked, washed clothes, cleaned house, communicate, dress, wear my hair, raise my child, everything. He would criticize my childhood, or my family as being faulty in some way. And just to let you know I am compulsive when it comes to cleaning and completing what I began. And me being set in my ways would show a stubborn side and to some degree try and change for the good of the relationship, but pretty much stay true to who I am.

Well, after the years of trying to control who I was as a person I decided to end the relationship and it took three months for him to get out of my home. But I had to give him one last moment of speaking his peace and trying to convince me that ending the relationship would be wrong. After his speach I told him to leave his key on the table and get his things.

He left his key but went to his car and brought back a 45 caliber hand gun. Forcing me in the bedroom and constantly threatening me with the weapon, I convinced him to go to the kitchen to cut off the stove. I ran to the front door and he caught me and he beat me with his fist and the weapon for approximately 15 minutes. Then I got away and ran to the balcony and jumped off from the second floor. He shot at me while I jumped off the balcony and shot me. Then he chased me through the area I lived and after shooting me twice in the left thigh and once in the right thigh, I fell, then he stood over me and shot me two more time. The gun jammed twice so that was two 45 caliber bullets that did not go into me. I was shot six times by a man that I just did not want to be with any longer.

But, what I realized was that I was in an abusive relationship for two years, after the fact. will I testify when he comes to court, yes, I'm looking forward to telling my story and him getting as much time permitted. Do I fear for my life and the life of my child, yes. I've changed my phone number about 5 times since the incident, and I've changed my address. I have anxiety attacks, and am paranoid with noises and sounds.

### LETTER 22 FROM: ANONYMOUS VICTIM

I was married in May 2002; I discovered I was pregnant in August 2002. In October 2002, my husband assaulted my in my first trimester. He withheld medical care, transportation and communication to others from me. He neglected me physically, mentally, emotionally and financially. This started shortly after the pregnancy.

In the October 2002 assault, I called 911 and when offered to press charges, I declined as I asked for more time to think about it—I was in shock at the time. A couple weeks later, I decided that I should press charges and went through with it.

The county filed felony charges (it is a felony to assault a pregnant woman) in the State of Florida against him. It was later "transferred down" to a misdemeanor offense.

I provided detailed interviews, written statements, photographs, witness name lists and contact information, time lines, summaries to the Prosecuting attorney. Months and months passed . . . the entire thing was so dragged out, confusing and seemingly disorganized. Eventually I testified, with no prep work or explanation of how the court room procedure (I was completely new to this!). I decided to testify because I thought that if this person was not my husband, just a stranger on the street who assaulted me that I would have testified, no question. I had also been attending a domestic violence support group, which help with my morale to testify—that is what helped me the most.

My grandparents had to drive 6 hours to assist me with my newborn as I nervously testified in court, with him (my abuser) 5 feet away from me. This made me sick with worry and anxiety. The attorney on the state side did not utilize one witness, one photograph or any other documentation. I later received a letter that he was found "Not Guilty" and could walk away with no consequence. My family and I felt victimized AGAIN by the legal system. I had been warned that victims who fail to appear, get too scared to testify, etc, frustrate the courts. I followed through with everything and was COMPLETELY let down by a failed system. I filed a complaint letter with the State. I received a letter saying they would "look into it" as to why no evidence or witnesses were called. That was in 2002. I have contacted them several times, still with no response. It is confusing to me as he was found guilty of the exact same assault, and found guilty of domestic violence in order to be issued a year long Permanent Injunction Order for Protection in the neighboring county.

The courts sent me nothing but mixed messages, injustice and unknowns. I regret that the system failed me so greatly.

I am sure that it works for some individuals, but from the women that I have spoken with they have had, sadly, similar experiences of disappointment with the legal system. Hopefully, nothing like this will never happen to me again, but I think the unfortunate consequence of my experience is that I would be hesitant to go through all that again, and that if someone asked me for advice in their own situation, I would most likely discourage them as it is way too much to be victimized twice. There is little benefit to cooperating, even if you want to . . .

### Letter 23 From: Anonymous Victim

I spent eight years of my life in a relationship with a man that physically and verbally abused me. He was an alcoholic drug abuser. Everything finally came to a head one night when he pinned me the floor and beat me until he fractured my skull. I managed to get out of the house and to a neighbor. I was told at the time by the local abuse shelter that it was one of the worst beatings they had seen. Charges were pressed against him by the county that I live in. The first thing that I had to do was set up an order of protection against him. Within a couple of weeks of the beating I had to show up in court to explain to the judge why I did not want him around me and our children. I was never told ahead of time that he would be there and when I walked down the hallway and saw him I started shaking uncontrollably and had a very difficult time keeping myself together. When we were brought together before the judge my advocate told me to speak loudly and clearly, but I was so scared I couldn't talk. The judge became angry with me and told me that I could have the order of protection for myself, but as a father he still had rights to see his kids. There was nothing more I could do simply because I was scared out of my mind and couldn't talk. I was not taken

seriously. As it turned out he never did make contact with the kids and he did stay away. Which I was very thankful for, but it definitely was not by any help from the court systems. He did 45 days jail time and was ordered to pay child support. He broke out of jail and never did pay child support. Over the next five years I lived my life in terror. I never knew if or when he might show up. He did call two different times threatening me, family members and friends. He told people that we knew that he had to stay away from me because if he didn't he would kill me. My terror did not end until the day he died from an illness five years later.

### LETTER 24 FROM: ANONYMOUS VICTIM

My father is a well respected physician. People know him as a kind and generous man, and his patients love him. The man we knew at home though, was someone else entirely. My father emotionally abused my mother, myself and my siblings for as long as I can remember. He knows (and I say knows because the abuse continues to this day) that physically harming someone is against the law, therefore he has always been careful to keep his abuse to the more intangible realm of emotional and verbal violence and degradation. Until I left home for college, I lived in constant fear of my father. He would consistently go into rages that would last days because one of us had committed some minor "offense"—such as not kissing him goodnight, or loading the dishwasher incorrectly, or not saying our prayers properly. In his rages he would scream at us at the top of his lungs, yelling that we were worthless and ungrateful. He would call us all manner of filthy names, or stand with all his bulk—he's 6'4", almost 300lbs—right over us, or with face shoved up in ours and yell, threatening to hit us. He would threaten to kill our mother, then sometimes he would taunt us, daring us to call the police. Of course we never called.

My mother, who tried to protect us and therefore suffered the worst of the abuse, was afraid for her and our lives. She was sure that he would kill us if she tried to leave, or if she sought help. I remember begging her to leave him when I was little, and her explaining that she was too afraid of what he might do. She was afraid that if it came to court no one would believe us because we weren't black and blue. Reading other survivors' stories though, I realize that maybe no one would have believed us even if we were black and blue.

What my mother was most terrified of was that he would gain custody of us. After all, my father had many people who could testify to the upright nature of his character. My mother on the other hand, had been systematically isolated from everyone she knew before her marriage to him, and would have had no one to testify for her. Her extremely religious family has always made it clear that staying together and avoiding a divorce was more important than her safety or happiness. I was so angry for so long that my mother didn't leave my father. I believe though that he would have killed at least my mother had we left. This knowledge hasn't made it any easier for my mother to stay with him. Just because we're still alive doesn't mean that our lives have not been irrevocably damaged by what he did to us.

The way the system is set up now is extremely unfriendly to survivors. What survivors need is anonymity, and protection from the accused—even before he or she is found guilty. Consider how we treat witnesses who testify against organized crime. We put them in a witness protection program; we grant them anonymity. Survivors of domestic violence deserve the same treatment. Those who have come forward to the courts have gone through an immense amount to get there. It takes extreme courage and tenacity for them to even get to the court room. If survivors are risking their lives to

testify—and they are—we need to make it worth their while. We need to treat them with respect.

### LETTER 25 FROM: ANONYMOUS VICTIM

I didn't see it as domestic violence at first; yes, he hit me when I was pregnant with our second child in 1997 but he only did it once. And when he killed my beloved cat because she was "getting in the way of our marriage", I didn't see that as domestic violence either. When he'd tell me how I was a failure as a mother and wife and "not doing it right" as a homemaker I believed him—how could I not?—look how angry I made him. When he'd sexually force himself on me, I closed my eyes, prayed it would be over soon and told myself "it's a wife's duty". I used to say "I can take whatever he dishes out so long as he doesn't touch my children" and he didn't, until he did and then I left.

Six years later, literally a world and a lifetime away I'm a happily remarried woman with a blossoming professional career. To look at me you'd never know that that I have a TRO until 2007, that my children have been abused and mistreated during their unsupervised visitations with their father, who found us and files motion after motion in family court.

My TRO "protects" me so long as my ex-husband allows it to and in an attempt to show everyone whose in control this summer, he violated its terms 4 weekends in a row. Arresting him for it only made him furious—at me—for reporting his violations. The third time I was reporting the violation he text-messaged me on my cell phone asking me if I was filing another report on him and argued with every police officer who told him he didn't have the right or power to override the conditions of a TRO.

The Prosecutor's Office picked my case up. The Victim Witness Advocates here are wonderful people; they explained that they would be prosecuting my case, not me, asking if I understood that. I said yes, but that wasn't my concern: I asked them if my ex-husband understood that because regardless of whoever prosecutes this, he's going to blame me for it. They asked if I thought jail time was a good enough consequence; I winced because jail time would only make him angrier about the "injustice" that I'VE put upon him. He'll get out and then what'll happen to me after he's had time to think it all over in a jail cell?

The Victim Witness Advocates sent information to me that read "Above all keep you and your children safe". That was sweet of them but keep me and my children safe? How? How is that done? In my case, my TRO is supposed to keep me safe and we've just seen how well that's worked. And keep my children safe? If I filed a TRO on their behalf it would be viewed as a vindictive gesture to prevent a father from seeing his children; if I ever rushed to my kids' rescue when they've called me for help I'D be the one getting arrested; while our police department rates my children are high-risk, CPS views it as only moderate so they need to be more substantially injured before they are willing to take action, and repetitively calling for their assistance doesn't reflect positively ON ME.

My case was scheduled and post-poned four times. At the last post-ponement, the judge said I wouldn't have to come back—that I could call to check-in on the status so I wouldn't miss anymore work. At the last hearing my ex just plead guilty and got a year's probation when I called to check-in so I didn't have to testify, phew! Just the thought of having to testify against him made me sick—I shook uncontrollably the first three times I was there. Because I was subpoenaed I HAD to show up but I would've loved it if I knew I could testify in some safer means. You don't know how angry he can get and what he's capable of when he gets that angry—I

DO. I can't begin to explain how scary it is to have to see your abuser again and for him to see you, especially in a courtroom, because there's no guarantee of safety once you leave it.

### LETTER 26 FROM: ANONYMOUS VICTIM

I was raped and continuously abused by my boyfriend 12 years ago. At the time I was only 13 and my abuser was 20. I was able to get out of this relationship because I moved. This man found me and continued to come to my work, look for my home, and harass my friends for 8 years after the rape. I believe he only stopped because I moved further away. I chose not to tell police because I was afraid of facing my abuser in court. I am now a Court Advocate for victims of Domestic Violence. I myself understand the reasons victims do not always want to come to court to testify. From this position I have seen the retaliation these women suffer, more abuse and continuous harassment. If I had known about evidence-based prosecution I think I would have reached out for help. My abuser still has some emotional control over me and I believe it would have eased my mind to prosecute him without being forced to face him in court.

### LETTER 27 FROM: CHRIS

I am Domestic Violence survivor. I left almost 8 years ago. I never pursued court with my abuser. He abused me for 18 years and never once got convicted of a crime. He got away with everything he did. But when it came time to press charges (I called police several times near the end) I got scared to go to court and face him. He would threaten me that if he went to jail I would be sorry. Please find an easier way to testify for us battered women so we can get the help we need to be set free. Thank You, Chris

## LETTER 28 FROM: ANONYMOUS VICTIM

On Dec. 5, 1999 my husband of 13 years tried to choke me to death as my nine year old son looked on. This was the climax to years of physical and emotional abuse by him to me and all three of our children. My daughter, then 11, called the local police and saved my life. He was arrested, and bailed out in four hours. For two nights my children and I did not sleep as we waited in terror for him to return. He was prosecuted and we were all subpoenaed to testify. I offered my children not to, but they wanted the court to hear the truth about him from his children.

On the day of their testimony, the experience was devastating for them; and their father's attorney tried his best—at their father's continued insistence in the courtroom—to confuse them and coerce them to say they did not really see or experience harm. The judge later said that "if this man was willing to abuse his child like that in front of a jury, one can only imagine what it must have been like behind closed doors." We left the court shaken and as terrified of him as we had ever been.

For years we all looked over our shoulders wherever we went. He stalked us during the first year, but from enough of a distance that I couldn't say he broke the restraining order. Many times since, he has said verbally and in writing that I brainwashed his children against him and forced them to testify against him, so he is not going to help them. There has been ongoing financial and emotional retribution from our choices to testify.

## LETTER FROM 29: ANONYMOUS VICTIM

I was married to an abusive man for six years. I finally found the courage to take my three young children and leave. I lived in a relatively small town and whenever I moved he would

find me in a matter of weeks. I finally had to pack up and leave everyone I know to relocate to another safe town. I could not come back and participate in his prosecution because he would have surely found a way to locate me again when I was in town. Escape is the only way women are safe.

### LETTER FROM 30: ANONYMOUS VICTIM

When I left my abusive husband (sexual, physical, mental and emotional), I pressed charges against him for the physical abuse. As we were leaving from the court room, I asked the bailiff to detain him long enough so I and my children could leave safely. Unfortunately he left the room to quickly. The bailiff escorted me to the front door and watched us until the corner. When I got to my car, parked on the side street, he was waiting for me. He beat me up again. Cars passed by but no one stopped. I did not let this stop me from pressuring him in court. It was the only way I knew that he would leave me alone. He was sentence to 7 years. That was 18 years ago, it still affects me.

### LETTER 31 FROM: ANONYMOUS VICTIM

I had a meeting with the D.A. and it was explained to me that I did not have to testify however it would make the case much stronger if I did. I knew that I had to for me. I had to stand up and stop this man from ever doing this again. I had to stand up and make a difference somewhere, somehow, someway, win, lose or draw. I could not live with myself if I didn't. I was so terrified I was crying in the office. But I was showed the crime scene photos and it was at that moment I knew there were no choices for me. The DA promised he would be handcuffed and shackled and would not be able to get to me. So I agreed.

Safety and security depending on the victim's situation is paramount to testifying. The mere mention of the attacker's name can put a victim into an unsafe place emotionally. I

could have and would have never gone to a home as my husband would have followed me or come to my place of business and waited and grabbed me and then taken me somewhere and beat me or killed me. Unless you lived it you just don't know it. People need to listen. We do KNOW our attackers. When asked, well why didn't you just leave, it's just never that simple. The list is very long. But there is a list. If the victim is alone and has to file all this paper work, who is there to help her? How does she even know there is paper work to file? Why isn't all the paper work and forms in one place? Victims of Crime is a wonderful program!! But how many victims know about it and how do they even find out? Once again the list is endless. Then there is the sentencing. When the victim finally has her day in court. It's a cleansing. At his sentencing I wrote a three page paper explaining to the court how this had affected my life and what I hope the court would see as fair punishment. "To put him away for the rest of his life so I feel safe for the rest of my life." If I can be of any further assistance please feel free to contact me. As I stated at the start I have no issues sharing or discussing in the hopes of educating the public and instilling the needed and much necessary confidence for women to take the stand. . . .emotionally, mentally and physically!!

## LETTER 32 FROM: ANONYMOUS VICTIM

I have been asked to contribute to my story about surviving and getting out of a domestic violence relationship. I think this kind of thing is so important because it is really hard to understand unless you either live it or hear it from someone who has.

I was in a violent dating relationship for 7 years. It was very cyclical. There were very good times, followed by a tension building phase, that then an explosion of sorts. Sometimes it

was screaming for no apparent reason, sometimes it was punching holes in the walls and throwing things, and then eventually it became physical. He would hit me, kick me and spit on me.

I tried to leave. I called the police 4 times. Two of those times, I told them it was a mistake and they left before any investigation was done at all. Twice I was brave and told me story. He was arrested both of those times but then later charges were dismissed because I didn't want to see him locked up. I couldn't go through with it.

I was also really financially dependant on him so I was, truly, hoping it would get better. He always told me he would be the only one who would really ever love me, and I believed it. So I focused on changing my behavior to affect his behavior . . . not knowing that it really never would.

I thought it would get better when I got pregnant, but it actually got worse. But, he also got smarter and started hitting me or kicking me in places where people wouldn't see the bruises or wounds.

When our baby was born, it got worse. I was always watching my back, walking on egg shells, trying not to say or do anything to set him off. It was especially scary because I knew I was the only one responsible for the baby's care. He told me all the time that if I ever left him he would take my baby and I'd never see him again. My baby was really all I had. He also said that if I ever got him arrested for beating me and he went to jail, CPS would come and take our baby away from me. There are so many reasons I was too scared to leave him or report him.

One day he hit me when I was holding the baby and the baby got hurt too. Then I got mad, because for the first time, he wasn't just hurting me. I waited until he went to work and

then I left with my baby. We went into a shelter and I was so scared because I knew that when he called our apartment from work and I wasn't there, he would know I left and he would be madder than ever.

I am still away from him now and he doesn't hit me, but he is still angry. Instead of hitting me, he is trying to get custody of my baby. Its weird because I left him to keep our baby safe but now he wants to take him away.

I guess I just want to explain that in real life, it's not easy to testify against someone you love, someone who has hurt you, someone you are afraid of, someone you depend on, someone you have a child with or someone who scares the hell out of you. For me, and for a lot of other domestic violence survivors, all of those things are in one person.

Supreme Court, U.S.
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No. 05-5705

# In The Supreme Court of the United States

HERSHEL HAMMON,

*Petitioner,*

v.

STATE OF INDIANA,

*Respondent.*

**On Writ Of Certiorari To The Indiana Supreme Court**

## BRIEF AMICUS CURIAE FOR WAYNE COUNTY, MICHIGAN IN SUPPORT OF RESPONDENT

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## STATEMENT OF THE QUESTION

I.

Is a statement made by a declarant who does not testify at trial testimonial and within the Confrontation Clause where not taken under circumstances accompanied by the solemnity and formality related to statements taken by magistrates at the common law?

TABLE OF CONTENTS


| | Page |
|---|---|
| Statement of the Question | i |
| Table of Contents | ii |
| Table of Authorities | iv |
| Statement of Material Facts and Proceedings | 1 |
| Interest of the Amicus | 1 |
| Summary of Argument | 1 |
| Argument | 2 |
| A. The Task At Hand Is to Discover Meaning of the Phrase in Question As Understood At the Time of Its Adoption | 2 |
| B. The Confrontation Clause and Crawford | 4 |
| (1) Gleanings from Crawford | 4 |
| (a) Historical background | 4 |
| (b) Conclusions drawn in Crawford | 6 |
| C. Can I Get A Witness: Testimonial Statements | 8 |
| (1) Dispelling a misconception: Crawford does *not* endorse three definitions of "Witnesses Against" | 8 |
| (2) The impossibility of "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial" as a test for "Witnesses Against" | 10 |

TABLE OF CONTENTS – Continued

Page

(3) The Confrontation Clause was not designed to "freeze" the law of hearsay..... 14

(4) Testimonial statements are marked by formality..... 16

(5) An excited utterance, even one made to the police, is not testimonial..... 22

(a) Historical background..... 22

(b) A statement satisfying the excited utterance foundation is not testimonial... 24

D. Summary..... 28

Conclusion..... 30

# TABLE OF AUTHORITIES

Page

FEDERAL CASES

California v. Green, 399 U.S. 149 (1970) ..... 5, 15

Crawford v. Washington, 541 U.S. 36 (2004) ..... *passim*

Florida v. Royer, 460 U.S. 491, 103 S.Ct. 1319 (1983) ..... 9

Granholm v. Heald, ___ U.S. ___, 125 S.Ct. 1885 (2005) ..... 4, 5

NY Trust Co. v. Eisner, 256 U.S. 345 (1921) ..... 5

Ohio v. Roberts, 448 U.S. 56 (1986) ..... 18, 30

United States v. Arnold, 410 F.3d 895 (CA 6, 2005) .. 25, 26, 28

United States v. Brito, ___ F.3d ___ (2005 WL 2673671, 12 (CA 1, 2005) ..... 11

United States v. Gibson, 409 F.3d 325 (CA 6, 2005) ..... 24

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United States v. Summers, 414 F.3d 387 (CA 10, 2005) ..... 17

White v. Illinois, 502 U.S. 346 (1992) ..... 8, 11, 18, 20

STATE AND ENGLISH CASES

Anderson v. State, 11 P.3d 350 (Alaska App. 2005) ..... 9

King v. Paine, 5 Mod. 163, 87 Eng. Rep. 584 (1696) ..... 5

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TABLE OF AUTHORITIES – Continued

Page

State v. Snowden, 867 A.2d 314 (Md., 2005) ..... 18

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TABLE OF AUTHORITIES – Continued

Page

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Griswold, "The Due Process Revolution and Confrontation," 119 U. Pa. L. Rev. 711 (1971) ..... 15

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Morgan, *Inventing the People: The Rise of Popular Sovereignty in England and America* (1988) ..... 2

Thayer, *A Preliminary Treatise on Evidence* (1898) ..... 24

Wigmore, *Evidence* (1983) ..... 5, 22, 23

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## STATEMENT OF MATERIAL FACTS AND PROCEEDINGS

Amicus adopts the factual statement presented by the State.

## INTEREST OF THE AMICUS

Amicus is the County of Wayne, Michigan. Wayne County is the largest County in the State of Michigan, and the criminal division of Wayne County Circuit Court is among the largest and busiest in the entire United States. The Wayne County Prosecuting Attorney, charged by state statutes and the State Constitution with responsibility for litigating all criminal prosecutions within his jurisdiction, has a vital interest in the outcome of the current litigation, as it may well affect the execution of his constitutional and statutory duties, particularly with regard to child abuse and domestic violence cases.

As the legal representative of a unit of state government, Supreme Court Rule 37 permits Amicus to file a supporting brief without permission of the parties.

## SUMMARY OF ARGUMENT

An out-of-court statement is testimonial if it was made to a governmental official or officials, who acquired it through structured questioning, and where the statement was made in a formal or solemn manner.

Whether a statement, such as one made to a 911 operator, is made to seek help, or instead to report a completed crime, is not the pertinent inquiry. A statement that truly meets the foundational requirements of the excited utterance exception cannot be testimonial. And the

constitution play no role regarding the admissibility of nontestimonial statements; questions of sufficient "reliability" of evidence to justify its admission are questions for the law of evidence of each particular jurisdiction.

## ARGUMENT

### A. The Task At Hand Is to Discover Meaning of the Phrase in Question As Understood At the Time of Its Adoption

The question here is a difficult one concerning the meaning of a part of the Sixth Amendment. How is ascertainment of meaning of a constitutional provision to be approached? Amicus believes that it must be approached bearing in mind that the political genius of our Revolution was its ultimate view of a constitution as something distinct from and superior to the entire government, expressing fixed principles designed to endure unless altered by the people.[1] The colonists "recognized from the beginning that a constitution ought to be different in kind from ordinary legislation" and "ought to bear some sort of direct popular authorization that would place it beyond the power of government to change," embodying "the difference between the constituent power of the people and the legislative power of the people's representatives."[2] A constitution "should not be altered without the Consent, or Consulting with the Majority of the people."[3]

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[1] Gordon S. Wood, *The Creation of the American Republic*, 1776-1787 (1969), p. 266.

[2] Edmund Morgan, *Inventing the People: The Rise of Popular Sovereignty in England and America* (1988), p. 256-258.

[3] Wood, p. 274.

Thus, by 1770 a constitution was said to be a "line which marks out the enclosure"; in 1773 it was the "standing measure of the proceedings of government" of which rulers are "by no means to attempt an alteration ... without public consent." In 1775 it was said that a constitution was "certain great first principles" on whose "certainty and permanency the rights of both the ruler and the subjects depend; nor may they be altered or changed by ruler or people, but only by the whole collective body ... nor may they be touched by the legislator."[4] Such a constitution must be written so as to acquire permanence, and, to stand above the government as the fundamental source of authority, it must represent the sovereign power; that is, the people, through an "act of all."[5]

The meaning of a constitutional provision, then, is to be garnered understanding that the ratifiers looked to the words employed "in the sense most obvious to the common understanding, and ratified the instrument in the belief that that was the sense to be conveyed."[6] Though the Constitution is certainly "as meant to apply to the present state of things as well as to all other past or future circumstances," "[i]t is not competent for any department of the government to change a constitution, or declare it changed, simply because it appears ill adapted to a new state of things."[7]

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[4] Bernard Bailyn, *The Ideological Origins of the American Revolution*, p. 182.

[5] Bailyn, *Origins*, p. 183-189.

[6] Cooley, *Constitutional Limitations* at 66.

[7] And see unposted letter of Madison to professor John Davis, 3 *Letters and Other Writings of James Madison* (1884), p. 232, 242: "After all, we must be guided ... by the intention of those who framed, or, rather, who adopted the constitution ... the intention, if ascertained by contemporaneous interpretation and continued practice, could not be overruled by any latter meaning put on the phrase, however warranted

(Continued on following page)

The Confrontation Clause provides that in criminal cases the accused has the right to be "confronted with the witnesses against him." The text is not particularly revealing; here, then, in determining what, in their sovereign capacity, the people promulgated requires an examination of the history that led to the clause – that is, the harm it was designed to prevent. *Crawford* has started, but only started, this task of interpretation,[8] and the meaning of "testimonial" must now be fleshed out.

## B. The Confrontation Clause and Crawford[9]

### (1) Gleanings from Crawford

#### (a) Historical background

The text of the clause provides a right in the accused to be "confronted with the witnesses against him." Critical to the Court in *Crawford* was the historical development of the Confrontation Clause, for that development informs its

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by the grammatical rules of construction were those at variance with it."

[8] This Court took this approach only recently in *Granholm v. Heald*, ___ U.S. ___, 125 S.Ct. 1885 (2005) in construing Section 2 of the Twenty-first Amendment. The Court looked to the history of the amendment and that which it was designed to allow: "The wording of § 2 of the Twenty-first Amendment closely follows the Webb-Kenyon and Wilson Acts, expressing the framers' clear intention of constitutionalizing the Commerce Clause framework established under those statutes. . . . The aim of the Twenty-first Amendment was to allow States to maintain an effective and uniform system for controlling liquor by regulating its transportation, importation, and use. The Amendment did not give States the authority to pass nonuniform laws in order to discriminate against out-of-state goods, a privilege they had not enjoyed at any earlier time." 125 S.Ct. 1902.

[9] *Crawford v. Washington*, 541 U.S. 36 (2004).

meaning.[10] The founding generation's immediate source of the concept was the English common law, which reveals that though the Confrontation Clause is related to the rules concerning hearsay, it was meant to prohibit only a specific sort of hearsay, not to freeze the law of evidence.

Amicus will not here review in depth the familiar history informing the meaning of the Confrontation Clause. Suffice it to say that the practice of admission of testimony taking at magisterial examinations in lieu of the testimony of the witness in court reached its apogee with the infamous trial of Sir Walter Raleigh in 1603 for treason. Depositions given by Raleigh's alleged accomplice, Cobham, were admitted, and Chief Justice Popham refused to produce him to testify, stating that "where no circumstances do concur to make a matter probable, then an accuser may be heard in court, and not merely by extrajudicial statement, but so many circumstances agreeing and confirming the accusation in this case, the accuser is not to be produced."[11]

These practices were viewed as abusive, and the law developed relatively strict rules of unavailability, admitting examinations only on a showing of inability to testify in person. But was even unavailability enough without cross-examination at the magisterial examination? *King v. Paine*[12] in 1696 held not. Though the case involved a misdemeanor, *Crawford* points out that by 1791 – the year the

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[10] "A page of history is worth a volume of logic." *NY Trust Co. v. Eisner*, 256 U.S. 345 (1921) (Justice Holmes). See also the method of interpretation in *Granholm v. Heald*, at footnote 34, supra. And see Section A, supra.

[11] 5 Wigmore § 1364, p. 16-17; *California v. Green*, 399 U.S. 149 (1970) (fn 9 and 11, p.507-508);

[12] *King v. Paine*, 5 Mod. 163, 87 Eng. Rep. 584 (1696) (cited in *Crawford*).

sixth amendment was ratified – courts were applying the cross-examination requirement to examinations by justices of the peace in felony cases.[13] Early 19th century treatises confirm the requirement, and in 1848 parliament amended statutes to make it explicit, confirming what was already afforded the defendant by the equitable construction of the law.[14]

Colonial practices, observed *Crawford*, were sometime abusive in a similar manner as the early common-law practice, and confrontation arguments were advanced. Many declarations of rights about the time of the Revolution included, then, a right to confrontation,[15] and early state decisions held that depositions could be read against an accused only if taken in his presence – "no man shall be prejudiced by evidence which he had not the liberty to cross examine."[16]

### (b) Conclusions drawn in Crawford

From these historical materials the conclusion ineluctably follows that the principal evil at which the Confrontation Clause was directed was the civil-law mode of *ex parte* examinations used as evidence at trial in the absence of the in-court testimony of the declarant. But this focus also suggests that not all hearsay implicates the Confrontation Clause; the admission of out-of-court statements from unavailable declarants where the statements occurred in situations that bear "little resemblance to the

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[13] 124 S.Ct. at 1361.

[14] 124 S.Ct. at 1361.

[15] 124 S.Ct. at 1363.

[16] 124 S.Ct. at 1363.

civil-law abuses the Confrontation Clause targeted"[17] is left to the law of evidence of the federal system and the various states.[18]

What statements bear sufficient resemblance to the abuses of the civil-law practice as to warrant their exclusion under the Confrontation Clause and which not? The text of the clause applies the right of confrontation to a confrontation of "witnesses" – those who "bear testimony." Testimony is typically a "*solemn* declaration or affirmation made for the purpose of establishing or proving some fact."[19] Thus, "an accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not."[20] Because the context bears a "striking resemblance" to examinations by justices of the peace in England, "statements taken by police officers in the course of interrogations[21] are also testimonial." But what of other statements and other contexts? How are they to be measured?

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[17] 124 S.Ct. at 1364.

[18] 124 S.Ct. at 1374.

[19] 124 S.Ct. at 1375.

[20] 124 S.Ct. at 1364.

[21] The Court observed that "[w]e use the term "interrogation" in its colloquial, rather than any technical legal, sense. *Cf. Rhode Island v. Innis*, 446 U.S. 291, 300-301 (1980). Just as various definitions of 'testimonial' exist, one can imagine various definitions of 'interrogation,' and we need not select among them in this case. Sylvia's [Crawford's wife's] recorded statement, knowingly given in response to *structured police questioning*, qualifies under any conceivable definition." 541 U.S. 36, 53, 124 S.Ct. 1354, 1365.

## C. Can I Get A Witness. Testimonial Statements

### (1) Dispelling a misconception: Crawford does *not* endorse three definitions of "Witnesses Against"

*Crawford* has come to be widely misrepresented and misapplied in critical particulars, sewing confusion in the decisions. *Crawford* did not provide a comprehensive definition of "testimonial"; indeed, it disclaimed any such attempt: "We leave for another day any effort to spell out a comprehensive definition of 'testimonial.'"[22] Nonetheless the following section of *Crawford* has been taken by an unfortunately increasing number of courts as establishing the "three faces" of testimonial statements:

> *Various formulations of this core class of "testimonial" statements exist*:
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> - "*ex parte* in-court testimony or its functional equivalent – that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially," Brief for Petitioner 23;
> - "extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions," *White v. Illinois*, 502 U.S. 346, 365, 112 S.Ct. 736, 116 L.Ed.2d 848 (1992) (THOMAS, J., joined by SCALIA, J., concurring in part and concurring in judgment);
> - "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would

[22] 541 U.S. 36, 68, 124 S.Ct. 1354, 1374.

> be available for use at a later trial," Brief for National Association of Criminal Defense Lawyers et al. as Amici Curiae.
>
> These formulations all share a common nucleus and then define the Clause's coverage at various levels of abstraction around it. *Regardless of the precise articulation*, some statements qualify under any definition – for example, *ex parte* testimony at a preliminary hearing. Statements taken by police officers in the course of interrogations are also testimonial under even a narrow standard.[23]

But this section of the *Crawford* opinion does *not* create three "categories" or "classes" of testimonial statements, it being the task of a court reviewing the evidence in question to see if it falls within one of these categories[24]; problematically, many courts are reviewing statements in precisely this fashion.[25]

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[23] 541 U.S. 36, 51-52, 124 S.Ct. 1363-1364 (bullet points and emphasis added).

[24] This approach to *Crawford* reminds one of Chief Justice (then Justice) Rehnquist's observation in a different context, that this mode of analysis reveals a "mind-set more useful to those who officiate at shuffleboard games, primarily concerned with which particular square the disc has landed on. . . . " *Florida v. Royer*, 460 U.S. 491, 520, 103 S.Ct. 1319, 1336 (1983).

[25] One court, as an example of this approach, has said that "[o]ur initial task then is to determine whether the statement . . . was testimonial. In a passage of the *Crawford* opinion that is often quoted [the passage quoted above], the Court identified three kinds of statements that could be properly regarded as testimonial statements. . . ." *Lopez v. State*, 888 So. 2d 693, 698 (Fla. Ct. App. 2004). Another, in the same vein, asserts that the Court in Crawford "also stated that testimonial statements were 'statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.'" *Anderson v. State*, 11 P.3d 350 (Alaska App. 2005).

At least one commentator has accurately observed that "[t]he Court did not endorse any of these three potential definitions."[26] One must look, then, to whether there are other practices that can fairly be said to bear close kinship to the abuses at which the Confrontation Clause was directed, and one discovers that while the clause "applies at a minimum" to prior testimony (including depositions and affidavits) and to police interrogations, it covers very little else (though many other statements may be excluded by the law of hearsay, a matter for decision by each state).

**(2) The impossibility of "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial" as a test for "Witnesses Against"**

The definition advanced in *Crawford* by the National Association of Criminal Defense Lawyers that testimonial statements are "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial" is both under and over-inclusive; it is also contrary to human experience, and essentially useless in the inquiry, if not downright misleading.[27] An examination of every out-of-court statement to determine whether it was

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[26] King-Reis, Andrew, "*Crawford v. Washington*: The End of Victimless Prosecution?" 28 Seattle U. L. Rev. 301, 316 (2005). The title of the article is itself a misnomer, however, for crimes where the victim does not testify are scarcely "victimless" (see all murder prosecutions).

[27] And the same is true for the formulation in the petitioner's brief in *Crawford* that a statement should be considered testimonial if it is one that the declarant "declarants would reasonably expect to be used *prosecutorially*" – whatever *that* means.

made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial is akin to "a snipe hunt carried on at midnight on a moonless landscape."[28] And it is a snipe hunt in which many courts, as indicated, are currently engaged.[29] This enterprise is bootless for reasons noted by Justice Thomas concurring in *White v. Illinois*:[30]

> Attempts to draw a line between statements made in contemplation of legal proceedings and those not so made would *entangle the courts in a multitude of difficulties*. Few types of statements could be categorically characterized as within or without the reach of a defendant's confrontation rights. Not even statements made to the police or government officials could be deemed automatically subject to the right of confrontation (imagine a victim who

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[28] *590 Realty Co., Ltd. v. City of Keene*, 444 A.2d 535, 536 (N.H., 1982).

[29] As one judge has cogently observed, "... these [the potential definitions mentioned in Crawford] formulations have engendered a 'miasma of uncertainty' among lower courts trying to identify testimonial hearsay.... Many courts have resolved this uncertainty by seizing on the most general formulation – a statement is testimonial if the circumstance under which the statement was made would lead an objective witness reasonably to believe that the statement would be available for use at a later trial – and applying it, without sufficient attention to *Crawford*'s textual and historical rationale.... Courts that have adopted this approach have divided on close questions such as the categorization of various 911 calls.... A sounder, more predictable body of law will emerge if, when applying the various 'formulations,' we hew closely to what I suggest is the foundational thrust of *Crawford*. *Crawford* employed a historical approach to define the reach of the Confrontation Clause.... In reviewing the historical record, the Court identified 'the civil-law mode of criminal procedure' as 'the principal evil at which the Confrontation Clause was directed.'" See *U.S. v. Brito*, ___ F.3d ___ (2005 WL 2673671, 12 (CA 1, 2005) (Howard, J. concurring).

[30] *White v. Illinois* 502 U.S. 346, 364 112 S.Ct. 736, 747 (1992) (emphasis suppled).

> blurts out an accusation to a passing police officer, or the unsuspecting social-services worker who is told of possible child abuse). It is also not clear . . . whether the declarant or the listener (or both) must be contemplating legal proceedings.

Professor Akhil Reed Amar concludes that to read "witness against" as referring to witnesses actually testifying in court, and also to such materials as videotapes, transcripts, depositions, and affidavits, *when prepared for court use and introduced as testimony*, is consistent with the text of the Confrontation Clause, its context within the Constitution, and with history.[31] On the other hand, while the approach of professor Richard Friedman is largely consistent with that of Professor Amar, and with Justice Thomas's approach in *White*, it goes a fatal step further – the step later championed in *Crawford* by the National Association of Defense Attorneys. Professor Friedman includes within the Confrontation Clause not only "formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions" but also any statement made by a person who at the time of its making "reasonably should be viewed as having made it with the anticipation that it would be presented at trial."[32] And he quickly slips away even from this formulation later in his article, and in a way that some courts attempting to apply this "test" have also, phrasing the test as whether the declarant "anticipates that the statement will be used in the prosecution *or investigation* of a crime."[33] A test requiring an expectation by the declarant that the statement will be used at trial, though itself unworkable,

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[31] Akhil Reed Amar, *The Constitution and Criminal Procedure* (Yale University, 1997) 129-130.

[32] Richard Friedman, "Confrontation: The Search for Basic Principles," 86 Geo. L.J. 1011, 1040 (1998).

[33] Friedman, at 1042.

atextual, and ahistorical, is quite a different thing from a test that the declarant have a reasonable expectation that the statement might be used in an *investigation*. Friedman's definition of "witnesses against" as including all unavailable out-of-court declarants who make statements to investigating police officers cannot be justified historically, contextually, or textually.[34]

One particularly apt example reveals Justice Thomas's prescience in this regard.[35] An individual called the 911 operator, and reported a shooting as it was occurring before his very eyes, including such remarks to the operator as "Oh, he's shooting at him, he's shooting at him"; "He's killing him, he's killing him, he's shooting him again"; and "He shot him and now he's running. And he shot him two or three times."[36] The declarant was unknown, and the tape admitted. Though the statements qualified both as excited utterances and present sense impression, they were found to be testimonial nonetheless. Because 911 operators are trained in how to gather information from callers reporting crimes that have occurred and also ongoing crimes, the court found the questions of the operator to constitute "interrogation." Further, though the caller was describing a shooting as it happened before his eyes the court reached the stunning conclusion that:

- The 911 call reporting a crime preserved on tape is the modern equivalent, made possible by technology, to the depositions taken by magistrates or

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[34] And see Amar, "Confrontation Clause First Principles: A Reply to Professor Friedman," 86 Geo. L.J. 1045 (1998): "Methodologically, his [Professor Friedman's] definition unwittingly reflects residual traces of hearsay doctrine and tends to slight constitutional text, history, and structure."

[35] *People v. Cortes*, 781 N.Y.S.2d 401 (N.Y. Sup. 2004).

[36] 781 N.Y.S.2d at 403-404.

> JPs under the Marian committal statute. Like the victims and witnesses before the King's courts an objective reasonable person knows that when he or she reports a crime the statement *will be used in an investigation and at proceedings relating to a prosecution.*[37]

This is risible (and fortunately stands essentially alone in the post-*Crawford* decisions and literature); it also demonstrates how the itself inappropriate "test" that a statement the declarant should reasonably expect to be used in-court is testimonial is quite often morphed into the quite different test that a statement the declarant should reasonably expect the police to make use of in their investigative efforts is testimonial (and one assumes the police do not take or receive statements simply for their possible amusement value, or to wile away the time).

The cases after *Crawford* often take different approaches, and reach wildly divergent results, because the framework employed is, for the reasons given by Justice Thomas, incoherent and problematic. This Court should set its face against the "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial" as a test for "witnesses against" as unworkable and, perhaps even more importantly, unjustified by the text and history of the Confrontation Clause.

### (3) The Confrontation Clause was not designed to "freeze" the law of hearsay

One view of the matter is a claim that the excited utterance or spontaneous declaration hearsay exception did not exist in 1791, and so cannot be employed now

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[37] 781 N.Y.S.2d at 415 (emphasis supplied).

without violating the Confrontation Clause. This is the view that the Confrontation Clause is simply a "super-hearsay" rule, incorporating whatever the law of hearsay was in the 1790's. A particularly esteemed former Solicitor General of the United States has well-put the matter; the Confrontation Clause "was to be interpreted in light of the law as it existed at the time of the adoption of the sixth amendment, and that law recognized exceptions to the hearsay rule. The Confrontation Clause had a purpose, clearly, but it was not designed to freeze the law of evidence or to exclude all hearsay evidence."[38] And three and a half decades before *Crawford* this Court itself rejected the notion that "the Confrontation Clause is nothing more or less than a codification of the rules of hearsay and their exceptions as they existed historically at common law."[39] One commentator has explained that an "incorporation of hearsay rules" approach would require that any development of the law of hearsay come only through constitutional amendment; instead, however, there "are more than a few plausible historical reasons to conclude that the Framers left the admissibility of hearsay to the law of

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[38] Erwin N. Griswold, "The Due Process Revolution and Confrontation," 119 U. Pa. L. Rev. 711, 714 (1971).

[39] *California v. Green*, 399 U.S. 149, 155 (1970). Note, for example, that a good 70 years after the adoption of the Sixth Amendment Professor Greenleaf, in his renowned evidence treatise, refers to statements that are "part of the res gestae" as being original evidence, and not hearsay at all, discussing what today would be the exceptions for present sense impression, statements of mental condition, such as intent, and statements of physical condition. See 1 Greenleaf, *The Law of Evidence*, §§ 98-114, § 123 (H.O. Houghton, 1863). With regard to hearsay exceptions, the treatise refers only to statements concerning reputation; statements concerning ancient possessions; declarations against interest; dying declarations; prior recorded testimony; and admissions and confessions. See 1 Greenleaf, Chapters VI-XII.

evidence,"[40] save a particular kind of hearsay – uncross-examined *formal statements taken by the government.*

**(4) Testimonial statements are marked by formality**

The Framers were "a group of lawyers and statesmen who were familiar with the evolutionary process by which common-law courts developed and modified the rules of evidence generally and the hearsay rules in particular."[41] The only lesson from history is that, as *Crawford* says, it was the purpose of the Confrontation Clause to prevent the Government from trying an accused by ex parte affidavits and depositions. The task, then, is to see if there *are* any modern practices with a close kinship to the ex parte examinations by magistrates beyond those identified in *Crawford* (which includes structured police questioning). The task is *not* to determine whether a particular hearsay exception was, in its modern form, embraced at the common-law at the time of the ratification of the Sixth Amendment. An insight of Professor Keith Whittington expressed in his brilliant exposition on constitutional interpretation[42] – that the Constitution "supports not only what its text requires but also much that it merely suggests or allows" – means that faced with a question of meaning such as that involved here, a court must not "strike down every government action that cannot be

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[40] John G. Douglass, "Beyond Admissibility: Real Confrontation, Virtual Cross-examination, and the Right to Confront Hearsay," 67 Geo. Wash. L. Rev. 191, 240 (1999).

[41] Douglas, at 240.

[42] Keith Whittington, *Constitutional Interpretation: Textual Meaning, Original Intent, and Judicial Review* (University Press of Kansas: 1999).

justified in originalist terms but only those that are *inconsistent* with known constitutional requirements."[43] It is not required that the law of hearsay as it now exists be shown to have been *embraced* by the common law of evidence at the time of the ratification of the Sixth Amendment, but only that any evidentiary principle now at issue is not *inconsistent* with that which was intended to be prohibited by the Confrontation Clause.

Admission at trial of the results of government interrogation without presentation of the declarant, be it of suspects or witnesses, amicus submits, constitutes the universe of practices sought to be precluded by the Confrontation Clause – along with governmentally acquired affidavits or depositions, prior testimony at a preliminary hearing, before a grand jury, or at a former trial – that are akin to the practice of admission at trial of ex parte pretrial examinations of witnesses by magistrates. This result is reached by examining the "common nucleus" of these various statements. That common nucleus has been mistakenly identified by some courts in the following manner:

> . . . we believe an objective test focusing on the reasonable expectations of the declarant under the circumstances of the case more adequately safeguards the accused's confrontation right and more closely reflects the concerns underpinning the Sixth Amendment. . . . Thus we hold that a statement is testimonial if a reasonable person in the position of the declarant would objectively foresee that his statement might be used in *the investigation* or prosecution of a crime.[44]

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[43] *Whittington*, at 172, 211 (emphasis supplied).

[44] *United States v. Summers*, 414 F.3d 387 (CA 10, 2005) (emphasis supplied).

The Tenth Circuit has, amicus submits, misapprehen led the clues available in *Crawford*; further, inclusion of an objective belief by the declarant that the statement might be used in the *investigation* of a crime is wholly unrelated to the taking by magistrates of pretrial depositions for use at trial in lieu of testimony from the declarant.[45] Closer to the mark is this conclusion by the Maryland Supreme Court:

> these standards share a common nucleus in that *each involves a formal or official statement made or elicited with the purpose of being introduced at a criminal trial*. . . . Although these standards focus on the objective quality of the statement made, the uniting theme underlying the *Crawford* holding is that *when a statement is made in the course of a criminal investigation initiated by the government*, the Confrontation Clause forbids its introduction unless the defendant has had an opportunity to cross-examine the declarant.[46]

It is the Maryland Supreme Court and not the Tenth Circuit that is on the right path.

The path to *Crawford* begins with *White*, a case decided under the Confrontation Clause view overturned by *Crawford*. Multiple out-of-court statements of a child were admitted, the child not testifying. Applying then-extant principles, this Court affirmed, finding the statements sufficiently reliable.[47] Justice Thomas, joined by Justice Scalia, expressed a different view, one pointing

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[45] And, for reasons previously stated, the test is unworkable and makes no sense.

[46] *State v. Snowden*, 867 A.2d 314, 324 (Md., 2005) (emphasis supplied).

[47] The prevailing test at the time being, of course, *Ohio v. Roberts*, 448 U.S. 56 (1986).

toward *Crawford*. That concurring opinion suggested that the "relevant historical materials" point to a "narrower reading of the Clause that the one given to it since 1980. . . ."[48] It concluded that there is "little if any indication in the historical record that the exceptions to the hearsay rule were understood to be limited by the simultaneously evolving common-law right of confrontation," and found that the then-current Confrontation Clause standards had "no basis in the text of the Sixth Amendment."[49] In addition to finding problematic a test for "testimonial" statements based on the contemplation of the declarant of future legal proceedings at the time of the making of the statement, adverted to previously, the concurring opinion focused as an alternative on *formal* materials:

> One possible formulation is that . . . the Confrontation Clause is implicated by extrajudicial statements *only insofar as they are contained in formalized testimonial materials*, such as affidavits, depositions, prior testimony, or confessions . . . [for] [I]t was this discrete category of testimonial materials that was historically abused by prosecutors as a means of depriving criminal defendants of the benefit of the adversary process . . . and under this approach, the Confrontation Clause would not be construed to extend beyond the historical evil to which it was directed.[50]

Thus, the concern of the concurring opinion of Justices Thomas and Scalia was that the Confrontation Clause was being read too broadly, not too narrowly, and they looked to two features shared by materials the admission of which

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[48] 112 S.Ct. at 745.

[49] 112 S.Ct. at 746.

[50] 112 S.Ct. at 747 (emphasis supplied).

without cross-examination the Confrontation Clause was aimed to prohibit: 1) governmental action; and 2) a formalized setting in the obtaining of the material. Justice Scalia authored *Crawford*, in an opinion fully joined by Justice Thomas, and the opinion signals no retreat from these concerns.

As with Justice Thomas's concurring opinion in *White*, Justice Scalia's majority opinion in *Crawford* reviewed the relevant historical materials concerning the evil at which the Confrontation Clause was aimed, concluding that the principal evil the Clause was designed to prevent was "ex parte examinations as evidence against the accused."[51] "Reliability" of out-of-court statements from unavailable declarants as a general matter was *not* the concern of the Clause; unreliable off-hand remarks are not within the Clause (though ordinarily inadmissible under the law of evidence), and quite reliable ex parte examinations of unavailable declarants are within the Clause, even if the law of evidence developed some exception to permit them.[52] The text of the Clause itself, said the Court, reveals its focus, for it applies to "witnesses" against the accused, and these are those who "bear testimony," which in itself is typically a "*solemn declaration* or affirmation made for the purpose of establishing or proving some fact . . . [a]n accuser who makes a *formal statement* to *government officers* bears testimony in a sense that a person who makes a casual remark to an acquaintance does not."[53] Again, the emphasis is on 1) governmental activity in the taking of the statement, and 2) the solemnity or formality of the occasion in which this is done. And the Court readily

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[51] *Crawford*, 124 S.Ct. at 1363.

[52] *Crawford*, 124 S.Ct. at 1364.

[53] 124 S.Ct. at 1364.

declaration" part of the "res gestae" amalgam, which came to be known as the excited utterance, first seems to have developed as an exception permitting the declaration of one who had been injured made "immediately upon the hurt received, and before [the declarant] had time to devise or contrive anything for her own advantage. . . .",[59] and may only have extended to the person injured and not someone observing the incident. There thus may have been no excited utterance exception to the rule against admission of hearsay at the time of the ratification of the Sixth Amendment other than as applied to the victim of some hurt or injury. Over time, however, the excited utterance developed as a distinct exception applicable to a statement made by any person, where there had been some event so startling as to render normal reflective thought processes "inoperative," and where the statement was made as a reaction to that event and not as a matter of reflection.[60] Initially, it appears, "immediacy" was required; that is, the statement had to have been made immediately upon observation of the startling event, but this requirement was a result of a confusion of the exception with verbal-act principles, and it became clear that the declaration was not required to be contemporaneous with the event, but rather made when the declarant was still under the influence of the excitement caused by the event.[61]

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[59] *Thompson v. Trevanion*, Skin. 402, 90 Eng. Rep. 179 (K.B.: 1694).

[60] McCormick, § 297, p. 704.

[61] Wigmore, § 1756, p. 230-231. Note that closeness in time is more strictly required with regard to the modern understanding of the present sense impression hearsay exception, which does not require that the event described be startling., but instead that the statement describing it be made as the event is occurring or *immediately* thereafter.

### (b) A statement satisfying the excited utterance foundation is not testimonial

That the excited utterance exception may not have existed, at least in its current form, at the time of the ratification of the Sixth Amendment is not the point here;[62] what matters is whether the modern understanding of the exception – as it is applied to excited utterances made to governmental officials – is contrary to the prohibition of the Confrontation Clause. An excited utterance made to someone other than a governmental official raises no Confrontation Clause issues.[63] Both the wrong approach, in the majority opinion, and the correct approach, taken by the dissent, in considering excited utterances to governmental officers (either at the scene when officers

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[62] Amicus would note the important observation made by Professor Thayer with regard to the construction of hearsay exceptions in general:

> It seems a sound general principle to say that in all cases a main rule is to have extension, rather than exceptions to the rule; that exceptions should be applied only within strict bounds, and that the main rule should apply in cases not clearly within the exception. But then comes the question, what is the rule, and what are the exceptions? There lies a difficulty. A true analysis would probably restate the law so as to make what we call the hearsay rule the exception, and make our main rule this, namely, that whatsoever is relevant is admissible To any such main rule there would, of course, be exceptions; but as in the case of other exceptions, so in the hearsay prohibition, this classification would lead to a restricted application of them, while the main rule would have freer course.

Thayer, *A Preliminary Treatise on Evidence* (Little, Brown, and Co., 1898), p. 522.

[63] That the statement must be to a governmental officer of some sort is not a matter of debate. See, e.g., *United States v. Gibson*, 409 F.3d 325, 338 (CA 6, 2005); *United States v. Manfre*, 368 F.3d 832, 838 n. 1 (CA 8, 2004); *United States v. Lee*, 374 F.3d 637, 645 (CA 8, 2004); *United States v. Saget*, 377 F.3d 223, 229 (CA 2, 2004).

respond, or through 911 emergency calls) are revealed in a recent opinion of the Sixth Circuit Court of Appeals.

Without belaboring the facts of the case, suffice it to say that the majority in *United States v. Arnold*[64] was of the view that a 911 call there was testimonial because in its view *any* statement made to government officials is testimonial under *Crawford*, this being the *only* question involved in the inquiry. The majority flatly said that "Gordon [the declarant] made the statements to government officials: the police. *This fact alone indicates that the statements were testimonial.*"[65] This "reasoning" ignores references in *Crawford* to the formality of the occasion, to the solemness of the statement, and to the need for the statement to have been the result of interrogation (even with that term employed, as said in *Crawford*, in its "colloquial" rather than technical sense, meaning simply that the Court was not referring to the definition of interrogation applicable to the issue of when *Miranda* warnings are applicable,[66] which applies only to persons in custody, and would have no application at all to witnesses).

That the statement was to a government official is the starting point not the ending point of the analysis. *Crawford* refers to interrogation "colloquially" – in its everyday sense. The *Merriam-Webster Dictionary* defines "interrogate"

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[64] *United States v. Arnold*, 410 F.3d 895 (CA 6, 2005). The opinion was withdrawn on rehearing, and the majority reversed on a different ground. Because Judge Sutton disagreed with the new basis for reversal, his discussion of *Crawford* remained germane, and he reaffirmed it. *U.S. v. Arnold*, ___ F.3d ___, 2005 WL 3315297 (CA 6, 11-23, 2005).

[65] *United States v. Arnold*, 410 F.3d at 903 (emphasis supplied).

[66] See *Rhode Island v. Innis*: (interrogation of a suspect in custody occurs through questions or statements that are reasonably likely to elicit an incriminating response; clearly, this cannot be the test for interrogation with regard to ordinary witnesses).

as "to question formally and systematically." Lexicographer Bryan Garner says that the term "suggests formal or rigorous questioning."[67] And *Black's Law Dictionary*[68] (7th ed., 1999) defines "interrogation" as "the formal or systematic questioning of a person." With regard to 911 calls, or statements made to the responding police officers at the scene, where the statement at issue satisfies the foundational requirements of the excited utterance exception – and not all such statements will – it is by definition nontestimonial; no distinction can be made regarding whether the purpose of the statement is to report a crime that has just occurred, or to request assistance during an ongoing crime, as some cases have done. The question is whether the statement is or is not an excited utterance (or present sense impression, if the statement describes an event as it is occurring or *immediately* thereafter).

Judge Sutton's dissent in *Arnold* is precisely correct; amicus cannot improve upon his remarks, set forth below:

> - As in this case, a 911 call generally will be a plea for help, not an effort to establish a record for future prosecution. *A 911 call represents a backward-looking response to an emergency that has already occurred or a contemporaneous response to an emergency that is occurring, not a forward-looking statement about a criminal prosecution that may or may not occur.*
> - Such calls also bear poor analogies to the kinds of testimonial statements that the Court has said will traditionally qualify – "affidavits, depositions, prior testimony, or confessions,". . . .
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> * * *

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[67] Garner, *A Dictionary of Modern Legal Usage* (2nd ed., 1995), p. 463.

[68] *Black's Law Dictionary* (7th ed., 1999).

- While this approach likely will mean that most 911 calls will be admissible, it does not mean that all of them will be admitted. There may well be situations where the 911 call is not far removed from a deliberative statement to investigating officers or where, to borrow a phrase from Professors Friedman and McCormack, it amounts to nothing less than "dial-in testimony." . . . Richard D. Friedman & Bridget McCormack, *Dial-In Testimony,* 150 U. Pa. L.Rev. 1171 (2002). District court judges are well equipped to determine on a case-by-case basis whether such an exception ought to apply, and we are well equipped to ensure that in the general run of cases "dial-in testimony" is not being admitted.
- In considering this issue, I cannot resist commenting on the nexus between the "excited utterance" inquiry and the "testimonial" inquiry. When a district court finds that a 911 call "relate[s] to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition" – when in other words the trial judge finds that the call qualifies as an excited utterance under Rule 803(2) of the Federal Rules of Evidence – it often would seem to be the case that the call is not testimonial in nature. *It is very difficult to imagine a "solemn" excited utterance or even a semi-solemn excited utterance.*
- Any statement that takes on the qualities that the Court has ascribed to the definition of testimonial evidence (a "solemn declaration . . . ," *Crawford,* 541 U.S. at 51, 124 S.Ct. 1354) or to agreed-upon forms of testimonial evidence ("affidavits, depositions, prior testimony, or confessions," *id.* at 51-52, 124 S.Ct. 1354) would seem to depart

> from the prerequisites for establishing an excited utterance. *To respect the one set of requirements would seem to disrespect the other. In the end, the number of "solemn" statements that also happen to "relate to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition" may be something approaching a null set.*[69]

To determine whether a statement is testimonial within the meaning of *Crawford*, so as to be barred from admission at trial by the Confrontation Clause unless the declarant testifies or the statement was subject to cross-examination when taken, a reviewing court should ask whether the statement was made to a governmental official, as a result of formal or systematic questioning, and given in a solemn or deliberate manner. That a statement falls within the exceptions for present sense impression or excited utterance means that the statement is not testimonial; that it falls without does not mean that it is, nor is the law of evidence frozen to exceptions as understood either in 1789 or currently.

## D. Summary

The Confrontation Clause was designed to have a limited, though extremely important, role. A particular practice, that of the government gathering evidence through ex parte depositions and affidavits, and then admitting that evidence at trial without presenting the witnesses, was banned. Those modern practices which are

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[69] *United States v. Arnold*, 410 F.3d at 913-915 (emphasis added). See also *United States v. Manfre*, supra, 368 F.3d at 838 ("Mr. Rush's comments were made to loved ones or acquaintances and are not the kind of memorialized, *judicial-process-created* evidence of which *Crawford* speaks"), emphasis supplied.

closely akin this banned civil-law practice are also prohibited, so that when the government engages in formal or structured questioning of an individual, who "bears witness" with a solemn or formal statement, that testimonial statement is inadmissible under the Confrontation Clause unless the declarant testifies (and the out-of-court statement may remain barred by rules of evidence, but the Confrontation Clause has nothing to say on the point). The law of evidence, especially hearsay exceptions, was not well developed at the time of the ratification of the Sixth Amendment, and the policy considerations concerning whether certain hearsay exceptions should be created or even expanded is not one with which the Confrontation Clause is concerned, outside of the evil it was designed to prevent.[70] Much hearsay falls without the Confrontation Clause and also without any hearsay exception; that it is not barred by the Confrontation Clause does not render it admissible. Where the statement made by a declarant not testifying at trial was not testimonial in that it was not to a governmental agent; or if to a governmental agent, not the result of structured or formal questioning (as in a response to an arriving police officer's question, "what happened here?"); or if itself not solemn or formal but within an exception such as the excited utterance or present sense impression, the question is solely one of

[70] In *Crawford* Justice Scalia suggests that there may be some "tension" between *Crawford* and the majority opinion in *White*, noting that the spontaneous declaration exception may not have existed at all at the time of the ratification of the Sixth Amendment. This discussion was, of course, dicta, and is scarcely an exploration of the relationship between excited utterances, when made to a governmental officer, and the Confrontation Clause.

policy and not constitutional law, and belongs to the law of evidence of the particular jurisdiction.[71]

## CONCLUSION

Wherefore, amicus submits that the convictions should be affirmed.

Respectfully submitted,

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[71] And amicus submits that *Ohio v. Roberts*, 448 U.S. 56 (1980) has no role to play with regard to nontestimonial statements to determine their "reliability." There is no general "reliability" component of due process that permits federal courts to superintend the evidentiary decisions of state courts so as to determine whether the evidence admitted was sufficiently "reliable" under some standard not itself either explicit or implicit in the constitution.